

MENS REA

OR

IMPUTABILITY UNDER THE LAW OF ENGLAND

BY

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PREFACE.

THIS work has been written with the double object of presenting a comprehensive view of the main principles of imputability, and of furnishing a practical guide to the statute and case law in which those principles have been applied.

The main divisions of the subject and arrangement of the chapters are shown in the usual manner, and also in tabular form on the page immediately preceding the commencement of Chapter I.; and, for convenience of reference on practical points, Tables of Abbreviations, Statutes, Cases and Contents, and a General Index (at the end of the book), have been added.

I have attempted in Chapter II., and the sections of Chapter X. dealing with "Innocent Agency" and "Responsibility for Servants' Acts," to classify the numerous decisions upon Ignorance of Fact, and upon the application to criminal law of the doctrine *Respondet superior*.

In Chapter V., and the part of Chapter X. dealing with "Lack of Self-Control," I have endeavoured to expound the doctrines of law and rules of procedure concerning madness in its relation to crime, and to collect all the decided cases of importance on that subject.

My thanks are due to the Incorporated Council of Law Reporting for their kind permission to use the "Law Reports," and also to Messrs. Stevens and Haynes for similar permission in respect of the "Criminal Appeal Reports," edited by Mr. Herman Cohen. Both series have been freely and extensively used, and in many cases copious extracts have been taken from the judgments therein reported. Quotations have also been made from various other series of reports, ancient and modern, and from professional and other treatises, references to the works used being given in each case, and explained or amplified in the List of Abbreviations at the beginning of the book.

D. A. S.

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LIST OF ABBREVIATIONS.

| | |
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| A. C. | Law Reports, Appeal Cases (1876—1914) in the House of Lords and Privy Council. (<i>See</i> "L. R.") |
| A. & E. | Adolphus and Ellis's Reports, King's Bench (1834—40). |
| And. | Anderson's Common Pleas Reports (1534—1604). |
| Aust. | "Lectures on Jurisprudence," John Austin (6th ed., 1911). |
| B. & Ad. | Barnewall and Adolphus's Reports, King's Bench (1830—34). |
| B. & Ald. | Barnewall and Alderson's Reports, King's Bench (1817—22). |
| B. & C. | Barnewall and Cresswell's Reports, King's Bench (1822—30). |
| B. & S. | Best and Smith's Reports, Queen's Bench (1861—69). |
| Bac. Abr. | Matthew Bacon's Abridgment (1736; ed. Gwillim and Dodd, 1832). |
| Bac. Max. | Maxims appended to "The Elements of the Common Lawes of England," Francis Bacon, Viscount St. Albans (1639). |
| Barn. K. B. | Thomas Barnardiston's King's Bench Reports (1724—34). |
| Barnett | "Legal Responsibility of the Drunkard," Henry Norman Barnett, F.R.C.S. (1908). |
| Baron Bramwell, Art. | Article on "Insanity and Crime," by Lord Bramwell, in <i>The Nineteenth Century</i> , December, 1885. |
| Beav. | Beavan's Rolls Court Reports (1838—66). |
| Bell | Bell's Reports of Crown Cases Reserved (1858—60). |
| Benth. | "Principles of Morals and Legislation," Jeremy Bentham (1780; ed. 1879). |
| Bernheim | "De la Suggestion," Hippolyte Bernheim (1911). |
| Best, Ev. | Best on the Law of Evidence (11th ed., 1911). |
| Beven | "Negligence in Law," Thomas Beven (3rd ed., 1908). |
| Binet | "La Suggestibilité," Alfred Binet (1900). |
| Binet & Féré | "Animal Magnetism," Alfred Binet and Charles Féré (3rd ed., 1891). |
| Bing. | Bingham's Reports, Common Pleas (1822—34). |
| Bing. N. C. | Bingham's New Cases, Common Pleas (1834—40). |
| Bl. Comm. | Sir William Blackstone's Commentaries on the Laws of England (1765—9; 21st ed., Hargrave, 1844). |
| Bl. W. | Sir William Blackstone's Reports, King's Bench (1746—79). |

- Bos. & P. Bosanquet and Puller's Common Pleas Reports (1796—1807).
- Bract. "The Laws and Customs of England," Henry de Bracton (1250—56).
- Bramwell "Hypnotism," John Milne Bramwell, M.B. (2nd ed., 1906).
- Bramwell (Allbutt) Article on "Hypnotism" by the same author in Allbutt and Rolleston's "System of Medicine," Vol. VIII., p. 1007 (1910).
- Bro. C. C. William Brown's Reports of Chancery Cases (1778—94).
- Broom, Leg. Max. Broom's Legal Maxims (7th ed., 1900).
- Bull, N. P. "Introduction to the Law Relative to Trials at Nisi Prius," Sir Francis Buller (1772; 7th ed., 1817).
- Bunb. Bunbury's Exchequer Reports (1713—41).
- Burr. Burrow's Reports, King's Bench (1757—72).
- C. B. Manning, Granger and Scott's Common Bench Reports (1845—56).
- C. B. N. S. John Scott's Common Bench Reports, New Series (1856—65).
- C. C. R. Law Reports, Crown Cases Reserved (1865—75). (*See* "L. R.")
- C. P. or C. P. D. Law Reports, Common Pleas (1865—80). (*See* "L. R.")
- C. M. & R. Crompton, Meeson and Roscoe's Exchequer Reports (1834—35).
- C. & K. Carrington and Kirwan's Reports, Nisi Prius (1843—53).
- C. & M. Carrington and Marshman's Reports, Nisi Prius (1840—42).
- C. & P. Carrington and Payne's Reports, Nisi Prius (1823—41).
- Camp. Campbell's Reports, Nisi Prius (1807—16).
- Carr "The Law of Corporations," C. T. Carr, M. A., LL.B. (1905).
- Ch. or Ch. D. Law Reports, Chancery. (*See* "L. R.")
- Chaster "The Law Relating to Public Officers," A. W. Chaster, LL.B. (1909).
- Chitty, Prerog. "The Law of the Prerogative of the Crown," Joseph Chitty (1820).
- Cl. & F. Clark and Finnelly's Reports, House of Lords (1831—46).
- Clark, Anal. "Analysis of Criminal Liability," Edwin Chas. Clark (1880).
- Cockb. "Charge of the Lord Chief Justice of England to the Grand Jury in the Case of *The Queen v. Nelson and Brand*," corrected by the Rt. Hon. Sir Alexander E. Cockburn, L.C.J. (2nd ed., 1867).
- Co. Litt. Part I. of Sir Edward Coke's Institutes; "Coke upon Littleton" (1628; 19th ed., Hargrave and Butler, 1832).

| | |
|------------------|---|
| Collinson . . . | “The Law Concerning Idiots, Lunatics and Other Persons Non Compotes Mentis,” George Dale Collinson (1812). |
| Com. Dig. • . . | “A Digest of the Laws of England,” Sir John Comyn (1762—67; 5th ed., by Anthony Hammond, 1822). |
| Com. Rep. . . . | Sir John Comyn’s King’s Bench, Common Pleas, and Exchequer Reports (1695—1741). |
| Comb. | Comberbach’s King’s Bench Reports (1685—98). |
| Cowp. | Cowper’s King’s Bench Reports (1774—78). |
| Cox | Cox’s Criminal Cases (1843—1914). |
| Cr. A. R. . . . | Criminal Appeal Reports, edited by Herman Cohen and published by Stevens and Haynes (1908—14). |
| Cr. Code | Draft Code, Appendix to Cr. Code Report. |
| Cr. Code Rep. . | Report of the Royal Commission on the Law relating to Indictable Offences, 12th June, 1878. |
| Cr. & J. | Crompton and Jervis’s Exchequer Reports (1830—32). |
| Cro. Car. . . . | Croke’s King’s Bench Reports, <i>temp.</i> Charles I. |
| D. & B. | Dearsley and Bell’s Crown Cases Reserved (1856—58). |
| D. & M. | Davison and Morival’s Queen’s Bench Reports (1843—44). |
| D. & R. | Dowling and Ryland’s King’s Bench Reports (1821—27). |
| Dalt. | “The Countrey Justice,” Michael Dalton (1618; ed. 1742). |
| Dears. | Dearsley’s Crown Cases Reserved (1852—56). |
| De G. M. & G. . | De Gex, Macnaghten and Gordon’s Chancery Reports (1851—57). |
| Den. | Denison’s Crown Cases Reserved (1844—52). |
| Diccy | “Introduction to the Study of the Law of the Constitution,” Prof. A. V. Diccy, K.C. (7th ed., 1908). |
| Dig. | Digest of the Roman Law (ed. Mommsen, Berlin, 1895). |
| Doug. | Douglas’s King’s Bench Reports (1778—85). |
| E. & B. | Ellis and Blackburn’s Queen’s Bench Reports (1852—58). |
| E. & E. | Ellis and Ellis’s Queen’s Bench Reports (1858—61). |
| East | Sir Edward Hyde East’s King’s Bench Reports (1800—12). |
| East, P. C. . . | Sir Edward Hyde East’s “Pleas of the Crown” (1803). |
| Eq. | Law Reports, Equity. (<i>See</i> “L. R.”) |
| Esp. | Espinasse’s Nisi Prius Reports (1793—1807). |
| Everest | “The Defence of Insanity in Criminal Cases,” Dr. L. F. Everest (1887). |
| Ex. | Welsby, Hurlstone and Gordon’s Exchequer Reports (1849—56), or, when preceded by “L. R.,” Law Reports, Exchequer. (<i>See</i> “L. R.”) |
| Ex. D. | Law Reports, Exchequer Division (1875—80). (<i>See</i> “L. R.”) |
| F. & F. | Foster and Finlason’s Nisi Prius Reports (1856—67). |

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|----------------------------|--|
| Finl. | "Report of the Case of R. v. Eyre," William Francis Finlason (1866). |
| Fitzh. | "La Graunde Abridgment," Anthony Fitzherbert (1514; ed. Tottell, 1577). |
| Forel | "Hypnotism or Suggestion in Psycho-Therapy," August Forel (trans. G. H. W. Armit, 1906). |
| Fost. | Sir Michael Foster's Crown Cases and Discourses on Crown Law (1762; 3rd ed., Dodson, 1792). |
| Gow | Gow's Nisi Prius Reports (1818-20). |
| Grasset | "L'Hypnotisme et la Suggestion," Dr. Jules Grasset (1903). |
| H. L. | Law Reports, House of Lords (1865-75). (<i>See</i> "L. R.") |
| H. L. Cas. | Clark's House of Lord's Cases (1847-66). |
| Hale | "Historia Placitorum Coronæ," Sir Matthew Hale (1736; ed. Dogherty, 1800). |
| Hawk. | "A Treatise of the Pleas of the Crown," Sir Wm. Hawkins (1716; ed. T. Leach, 1795). |
| Hearn | "The Government of England," Wm. Edward Hearn, Q.C. (2nd ed., 1887). |
| Highm. | "Summary Proceedings in Inland Revenue Cases," Sir Nathaniel Highmore (3rd ed., 1901). |
| Holmes | "The Common Law," Oliver Wendell Holmes (1882). |
| Holt | Holt's Nisi Prius Reports (1815-17). |
| Hudson | "The Law of Psychic Phenomena," Thomas Jay Hudson (1893). |
| Inst. | Sir Edward Coke's Institutes (1642-44; ed. 1809). |
| J. P. | Justice of the Peace Reports. |
| J. P. N. | Justice of the Peace Newspaper. |
| Janet | "The Major Symptoms of Hysteria," Pierre Janet (1907). |
| Jenk. Cent. | Jenkins's "Eight Centuries of Reports" (1681; 3rd ed., 1771-77). |
| Just. Inst. | Justinian's Institutes of Roman Law (ed. Mommsen, Berlin, 1895). |
| K. B., or K. B. D. | Law Reports, King's Bench (1901-14). (<i>See</i> "L. R.") |
| Kel. | Sir John Kelyng's "Reports of Divers Cases in Pleas of the Crown" (1602-1706; ed. 1873). |
| Ken. S. C. | "A Selection of Cases Illustrative of English Criminal Law," Prof. Courtney Stanhope Kenny, LL.D., F.B.A. (3rd ed., 1912). |
| Kenny, Outl. | "Outlines of Criminal Law," same author (5th ed., 1911). |
| Kerr | "Inebriety or Narcomania," Norman Shanks Kerr (3rd ed., 1894). |

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| Kingsbury . . . | "The Practice of Hypnotic Suggestion," Dr. Geo. Chadwick Kingsbury (1891). |
| Knapp, P. C. . . | Knapp's Privy Council Cases (1829-36). |
| Kov. | "La Psychologie Criminelle," P. I. Kovalevsky (1903). |
| L. J. M. C. . . . | Law Journal Reports (Magistrates' Cases), New Series (1831-1914). |
| L. J. N. | Law Journal Newspaper. |
| L. R. | Law Reports (1865-1914), published by the Incorporated Council of Law Reporting for England and Wales. |
| L. R. Ir. | Law Reports, Ireland (1879-1914). |
| L. T. | Law Times Reports, Old Series (1843-58). |
| L. T. N. | Law Times Newspaper (1821-1914). |
| L. T. N. S. . . . | Law Times Reports, New Series (1859-1914). |
| L. & C. | Leigh and Cave's Reports of Crown Cases (1861-65). |
| Ld. Raym. | Robert Baron Raymond's King's Bench and Common Pleas Reports (1694-1734; 4th ed., 1792). |
| Leach | Leach's Reports of Crown Cases (1730-1815). |
| Lev. | Sir Creswell Levinz's King's Bench Reports (1660-96; 3rd ed., 1797). |
| Lew. | Sir G. A. Lewin's Reports of Crown Cases (1822-38). |
| Lib. Ass. | "Le Livre Des Assizes et Pleas del Corone," Part V. of the Year Books (1326-77). |
| Lightwood . . . | "The Time Limit on Actions," by John M. Lightwood, M.A. (1909). |
| Lilly | "Idola Fori," W. S. Lilly (1910). |
| M. & G. | Manning and Granger's Common Pleas Reports (1840-44). |
| M. & M. | Moody and Malkin's Nisi Prius Reports (1826-30). |
| M. & R. | Moody and Robinson's Nisi Prius Reports (1830-43). |
| M. & S. | Maule and Selwyn's King's Bench Reports (1813-19). |
| M. & W. | Meeson and Welsby's Exchequer Reports (1836-47). |
| McConnell . . . | "Criminal Responsibility and Social Constraint," R. M. McConnell, Ph.D. (1912). |
| Macdonnell . . . | "The Law of Master and Servant," Sir John Macdonnell, M.A., LL.D., C.B. (2nd ed., 1908). |
| Markby | "Elements of Law," Sir Wm. Markby (1874). |
| Maudsley | "Responsibility in Mental Disease," Dr. Henry Maudsley (1874). |
| May | "The Law, Privileges, Proceedings and Usage of Parliament," Sir Thomas Erskine May, K.C.B., D.C.L. (11th ed., 1906). |
| Mercier (Allbutt) . | Article on "Vice, Crime and Insanity," in Allbutt and Rolleston's "System of Medicine," Vol. VIII, p. 842 (1910). |
| Merc., Cr. Resp. . | "Criminal Responsibility," Chas. A. Mercier, M.D., F.R.C.P. (1905). |

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| Merc., Cr. & Ins. | “Crime and Insanity,” same author (1911). |
| Mod. | Modern Reports (King’s Bench, Common Pleas and Exchequer, 1669—1732). |
| Moll | “Hypnotism,” Albert Moll (5th ed., 1901). |
| Moo. | Moody’s Crown Cases Reserved (1824—44). |
| Moo. Ind. App. | Moore’s Indian Appeals (1836—72). |
| Moo. P. C. | Moore’s Privy Council Cases (1836—62). |
| Myers | “Human Personality and its Survival of Bodily Death,” Frederic Wm. Hy. Myers (1903). |
| Nicolson (Allbutt) | Article on “Criminal Lunacy,” by David Nicolson, C.B., M.D., in Allbutt and Rolleston’s “System of Medicine,” Vol. VIII., p. 1017 (1910). |
| O. B. Sess. Ps. | Central Criminal Court Sessions Papers. |
| Oppenh. | “Criminal Responsibility of Lunatics,” Dr. H. Oppen- heimer (1909). |
| P. Wms. | W. Peere Williams’s Chancery and King’s Bench Reports (1695—1734 ; 6th ed., 1826). |
| Parker. | Sir Thomas Parker’s Exchequer Reports (1743—67). |
| Peake | Peake’s Nisi Prius Reports (1790—1812). |
| Pitt Lew. & Sm. | “The Insane and the Law,” Pitt Lewis and R. Percy Smith (1895). |
| Plowd. | The Commentaries or Reports of Edmund Plowden (King’s Bench Common Pleas and Exchequer, 1550—80 ; ed. 1816). |
| Pollock, Art. | Article, “What is Martial Law ?” by Sir Frederick Pollock, in <i>Law Quarterly Review</i> , Vol. XVIII., p. 152. |
| Poore | “Medical Jurisprudence,” Geo. Vivian Poore (2nd ed., 1902). |
| Q. B. | Adolphus and Ellis’s Queen’s Bench Reports (1841—52) or, when preceded by “L. R.” or the year (<i>e.g.</i> , “1898, Q. B. ”) Law Reports, Queen’s Bench. (<i>See</i> “L. R.”) |
| Q. B. D. | Law Reports, Queen’s Bench Division (1875—90). (<i>See</i> “L. R.”) |
| R. R. | Sir Frederick Pollock’s Revised Reports (1785—1865). |
| R. & M. | Ryan and Moody’s Nisi Prius Reports (1823—26). |
| R. & R. | Russell and Ryan’s Crown Cases Reserved (1799—1824). |
| Ray | “Medical Jurisprudence of Insanity,” Isaac Ray (5th ed., 1871). |
| Rent. | “The Law and Practice of Lunacy,” Alexr. Wood Renton (1896). |
| Rent. & Rob. | Renton and Robertson’s “Encyclopædia of the Laws of England ” (2nd ed., 1908). |

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| Rep. | Coke's Reports (1600—15; ed. Thomas and Fraser, 1826). |
| Rob. & Wall. | "The Duty and Liability of Employers," W. H. Roberts and Geo. Wallace, M.A. (4th ed., 1908). |
| Rolle, Abr. | Henry Rolle's Abridgment (1668). |
| Rolle Rep. | Henry Rolle's King's Bench Reports (1675—76). |
| Rosc. | Roseoc's Criminal Evidence (13th ed., 1908). |
| Russ. | Russell on Crimes and Misdemeanours (7th ed., 1909). |
| Salk. | Salkeld's Reports (King's Bench, Common Pleas and Exchequer, 1689—1712). |
| Salmond | Salmond's "Jurisprudence" (ed. 1907). |
| Sc. Sess. Cas. | Macpherson, Lee and Bell's Reports of Cases in the Scottish Court of Session (1862—73). |
| Shel. | "A Practical Treatise on the Law concerning Lunatics, Idiots and Persons of Unsound Mind," Leonard Shelford (1833; 2nd ed., 1847). |
| Sidis | "The Psychology of Suggestion," Boris Sidis (1898). |
| Snow | "Cases and Opinions on International Law," Freeman Snow, P.D., LL.B. (1893). |
| Sol. J. | Solicitors' Journal Newspaper. |
| Stark | Starkie's Nisi Prius Reports (1814—23). |
| St. Dig. | Sir James Fitzjames Stephen's "Digest of Criminal Law" (1877; 6th ed., 1904, except where 1st ed. expressly cited). |
| St. Gen. V. | "A General View of the Criminal Law," same author (2nd ed., 1890). |
| St. Hist. | "A History of the Criminal Law of England," same author (1883). |
| St. Tr. | Howell's State Trials (1680—1820). |
| Str. | Strange's King's Bench Reports (1716—46). |
| T. L. R. | Times Law Reports (1884—1914). |
| T. R. | Durnford and East's Term Reports (King's Bench, 1785—1800). |
| Taunt. | Taunton's Common Pleas Reports (1807—19). |
| Tayl. Man. | "Manual of Medical Jurisprudence," Alfred S. Taylor (10th ed., 1879). |
| Tayl. Princ. | "Principles of Medical Jurisprudence," same author (6th ed., 1910). |
| Taylor, Ev. | "A Treatise on the Law of Evidence," F. Pitt-Taylor (1848; 10th ed., 1906). |
| Times, N. | "The Times" Newspaper. |
| Tuckey | "Treatment by Hypnotism and Suggestion," Chas. Lloyd Tuckey, M.D. (5th ed., 1907). |
| Tuke | "Dictionary of Psychological Medicine," Daniel Hack Tuke (1892). |
| Tyr. | Tyrwhitt's Exchequer Reports (1830—35). |
| Tyr. & G. | Tyrwhitt and Granger's Exchequer Reports (1835—36). |

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|------------------------|---|
| Ventr. . . . | Ventris's Common Pleas Reports (1669—90). |
| Vincent . . . | "Elements of Hypnotism," R. H. Vincent (1897). |
| Viner | "General Abridgment of Law and Equity," Charles Viner (1742—53). • |
| W. N. | Weekly Notes, published by the Incorporated Council of Law Reporting. |
| W. R. | Weekly Reporter (from 1852). |
| Willes | Willes' Common Pleas Reports (1734—58). |
| Wills, Circ. Ev. . . . | "The Principles of Circumstantial Evidence," William Wills (6th ed., 1912). |
| Winslow | "The Plea of Insanity in Criminal Cases," Dr. Forbes Winslow (1843). |
| Y. B. | Year Books (King's Bench, Common Pleas, Exchequer and Assize Reports, 1292—1537). |

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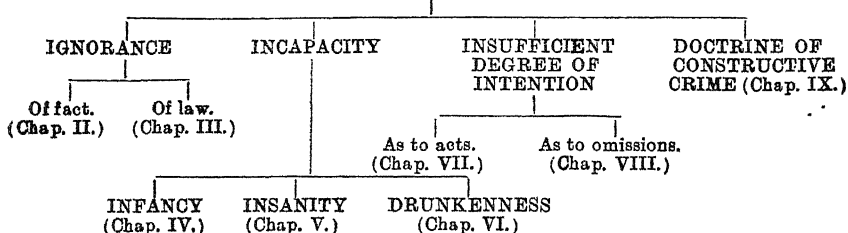
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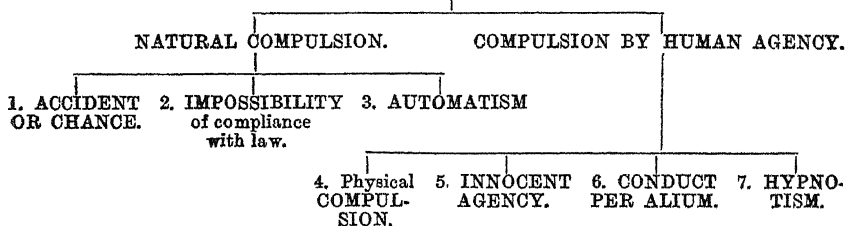
EXCUSES FROM CONVICTION OF CRIME.

(*Vide* Chapter I.)

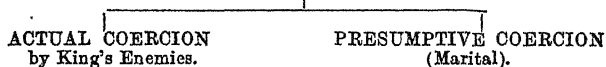
FIRST PRINCIPLE : ABSENCE OF INTENTION



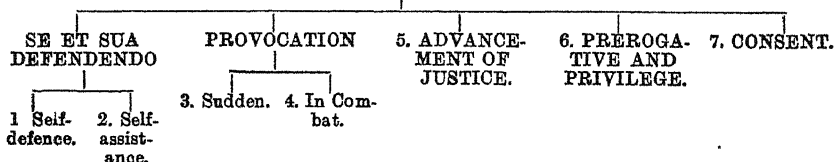
SECOND PRINCIPLE : ABSENCE OF VOLITION (Chapter X.).



THIRD PRINCIPLE : COERCION (Chapter XI.).



FOURTH PRINCIPLE : OCCASIONAL EXCUSE (Chapter XII.).



MENS REA.

CHAPTER I.

GENERAL PRINCIPLES.

(1) INTENTIONALITY.

“INTENTION meets us at *every* step, in *every* department of jurisprudence” (a); and if it can be said to be more prominent or important in one branch of jurisprudence than in another it is so in criminal law; for “there is nothing either good or bad, but thinking makes it so.”

Criminal law bears, more obviously than other branches of the *corpus juris*, the character of a command addressed by the Sovereign to the subject; for in every indictment, whether alleging an act contrary to statute law or merely charging an offence against the peace, the express or implied command of the Sovereign is distinctly stated to have been contravened. With no less prominence is it invariably alleged that the command has been disobeyed by some form of culpable intention, feloniously, maliciously or otherwise wrongfully, according to the nature of the particular crime.

The first step in the present inquiry must therefore be to ascertain clearly the meaning of the word *intention* as applied to conduct generally, and in particular as relative to the acts and omissions which it is the object of criminal law to prohibit or enjoin.

Acts may be simple or complex. A simple act may best be defined as a voluntary movement of the body (b), for a moment's thought suffices to show that the active life of every one of us consists, from birth to death, merely of a series of corporal movements (broken by intervals of passivity), inextricably mixed up with the consequences thereof, influenced by, and on their part influencing, the course of events happening around us.

(a) Aust., Lect. 18, p. 411.

(b) Aust., p. 366: St. Hist., II., 99.

It is impossible for human intelligence to trace all, or even approximately all, the consequences of (or events which flow from) any simple act. The law therefore concerns itself with a simple act, as such, only when it has a direct and obvious consequence or an intrinsic importance, apart from other acts which may precede or follow it.

A complex act may be defined as a series (or several series) of simple acts and their consequences, artificially considered as grouped together, and as separate from all other acts and events. Those facts and events which, though not forming part of a complex act, are connected with it and affect its character or tendency, are usually referred to as its circumstances.

Criminal law is mainly concerned with the prohibition of various complex acts, although it may occasionally prohibit a simple act, or may, in some few cases, directly enjoin either a simple or a complex act.

An act of murder is in some cases a simple act, but is more often complex. An instance of the former would be a sudden stab or mortal blow. An example of the latter would be a murder by poisoning, the simple acts constituting it being separated perhaps by long intervals of time, each of them being followed by its appropriate consequences, and the whole complex act resulting in the fatal consequence which gives to it its legal importance or character.

It is often a matter of doubt or debate whether a particular act does or does not form part of the *res gestæ*, or the complex act charged against a prisoner (c).

The classification of simple acts as reflex, instinctive, habitual, automatic, etc. (d), is of more interest to the medical than to the legal practitioner, it being seldom necessary to analyse for judicial purposes each of the various simple acts whereof a complex act is composed.

Acts, whether simple or complex, may be prohibited (and therefore of legal importance) either as involving certain consequences, or apart from and independently of their consequences.

(c) Vide *R. v. Townley*, L. R. 1 C. C. R. 315 (1871); *R. v. Foley*, L. R. (Ir.), 1889, C. L. 299, Ken. S. C. 241.

(d) Vide *Mercier*, Cr. Resp., 21 et seq.

The simple act of one man striking another is of importance under the law prohibiting assault and battery, apart altogether from its actual or probable consequences. Under the law of homicide it is of importance only in the event of its involving the consequence of the victim's death.

So, in the case of complex acts : a murder by poisoning is a complex act deriving its importance solely from the fatal consequence involved ; whereas a bigamy is a complex act of intrinsic importance, rendering the bigamist liable to the penal sanction *ipso facto*, as soon as it is complete, apart altogether from its consequences.

Now, in the case of an act considered without regard to its actual or possible consequences, intention consists solely of advertence, *i.e.*, cognizance of the material circumstances, or facts surrounding the act and giving to it its legal character and importance. In the case, however, of an act considered as connected with a particular consequence, intention comprises not only advertence to circumstances already in existence, but also advertence to the consequence in question as a possible consequence, coupled with expectation of that consequence as a probable one.

Thus, a man commits bigamy if, when he undergoes the ceremony of marriage, he knows that he has a wife still living ; he commits wilful perjury if, when he swears falsely, he knows that his statements are untrue. In either case his guilt does not depend upon any consequence of his crime, nor does his guilty intention depend upon any expectation by him of a particular consequence. But a man does not commit wilful murder by killing another, unless he not only knew the material circumstances of what he was doing at the time, but also expected death would ensue. Here, as the consummation of the crime depends upon a fatal consequence, so the guilty intention must go beyond mere knowledge of existing facts, and must include expectation of that fatal consequence.

It is often said (e) that a man does or does not intend a consequence, when all that is meant is that he does or does not desire it. This is a wrong use of the word *intention*, though intention and desire do in

(e) Vide, *e.g.*, Mercier, Cr. Resp., 45, 52.

fact correspond, or accompany each other, in the vast majority of cases.

Motive, or the desire prompting a man's conduct (*f*), is often of the utmost importance by way of evidence in proving the existence of intention, but the two things are none the less distinct (*g*).

If A. murderously shoot at C., knowing that in the way to him the bullet may kill or wound B., who is standing in the line of fire : here, A. both intends and desires the death of C., which forms the motive of the act, but he intends the death or wounding of B. without desiring it, that being a concomitant to the happening of which he is at the most indifferent (*h*).

It cannot truly be said that A. desires it as a means to the death of C., because A. may well prefer that B. should live, and in fact neither his death nor the fact of his being in the line of fire is of the slightest assistance in the killing of C. ; both are rather a hindrance than otherwise. Yet the harm to B. is intended even more fully than C.'s death, which is more remotely expected, because the bullet may be stopped by B.'s body, or diverted from its course, and so not reach C. who is further away.

In cases of this kind Bentham calls the intention by A. to kill or wound B. an oblique or indirect intention (*i*), but the term is inexact. It might perhaps be said that there is an indirect *desire* to kill or hurt B., not as an end, nor as a means to the death of C., but as a necessary concomitant. Even that, however, would be a strain on language ; for A. does not truly desire a consequence to which he is indifferent and from which he may even be averse. In such a case intention and desire do not cover the same ground. The desire to kill C. is the motive of the act, and concurs with intention so far as regards the death of C., but as regards the death or wounding of B., that particular consequence is intended without being desired.

An omission is not, like an act, a real event, but is merely an artificial conception, consisting of the negation of a particular act. It has been

(*f*) Cf. Aust., pp. 160-2 ; Clark, Anal., 72.

(*g*) *R. v. Welch*, 1 Q. B. D. 23 (1875).

(*h*) Cf. Clark, Anal., 97 n., 98.

(*i*) *Morals and Legislation*, Chap. 8.

paradoxically asserted (*k*) that "wilfully to refrain from acting is to act," but that statement, like most paradoxes, is repugnant to common sense.

An omission may be due to passivity, or to acts inconsistent with the act omitted. Cases of the former kind, which are few and almost negligible, may be called passive omissions. Cases where an omission is due to inconsistent action are frequent in occurrence, and are divisible into two classes, according as the inconsistent acts committed are prior to or coincident with the omission. In the former case, the omission is nothing more or less than a consequence of the acts preceding it.

This distinction is of importance in the consideration of any question as to whether an omission is intended or not. If the omission be entirely attributable to present inconsistent action, or to mere passivity, intention consists of advertence alone, the omission being intentional if the person adverts to the act omitted and does some other act in lieu thereof, or remains passive. If, however, as would usually be the case, the omission be due to prior inconsistent action, the omission being merely a consequence of what has already been done, intention consists of advertence coupled with expectation, as in the case of any other consequence of an act done.

Up to this point, intention with regard to consequences has been considered only so far as there may be, on the one hand, advertence coupled with full expectation, and, on the other hand, complete in-advertence. Between these two states of mind, however, lie various intermediate degrees of intention, such as temerity, recklessness, rashness, foolhardiness, carelessness, negligence and the like, all of which are so many forms of what may be denominated *intentionality*, or intention considered as subject to modification.

Few events depending upon human action can be said to be fully expected, as inevitably following a particular act. The most determined blow may be parried: the most carefully planned suicide may fail. Full intention must therefore be understood as consisting merely of advertence coupled with a high degree of expectation (*l*).

(*k*) Mercier, Cr. Resp., 28.

(*l*) Cf. Clark, Anal., 46; *R. v. Probert*, 2 East, P. C. 1030 (1800).

Intention, wherever it involves the element of expectation, is subject to modification by an infinite number of degrees, according to the knowledge and temperament of the individual, the gravity or triviality of the act, and the nature and bearing of innumerable matters affecting an act and the person performing it. But all forms of true intentionality, whether concerned with acts or with omissions, may be regarded as falling under three classes: full intention, imperfect intention (or uncertainty), and inadvertence.

Full intention is usually signified, in English law, by the word *intent* (*m*). It may or may not be the outcome of premeditation, or advertence to the consequence during some period prior to the performance of the act. Premeditation or its absence is no criterion as to the existence of full intention, except to this extent, that where it is proved it will usually involve not only a strong desire of the natural consequence of the act, but also intention thereof in a high degree. "Sudden temptation" or "want of deliberation" are therefore no excuses for crime, though they ought to be taken into consideration in the passing of sentence (*n*).

Imperfect intention, or uncertainty, includes all intermediate states of mind between full intention and sheer inadvertence. The line of division between full intent and imperfect intention corresponds with the line between probability and improbability, as appearing to the person acting. The uncertainty may be inherent to the consequence, or may arise from insanity, partial ignorance, carelessness, or any other defective condition or operation of the mind.

Inadvertence admits of no modification, because advertence can but exist or not exist at the time when an act is committed or an omission takes place. Like imperfect intention, however, inadvertence may be due to a multiplicity of causes, such as insanity, total ignorance of essential facts, infancy, inexperience, or sheer thoughtlessness.

(2) CULPABILITY.

"All crimes have their conception in a corrupt intent, and their consummation and issuing in some particular fact" (*o*).

(*m*) Vide *R. v. Natrass*, et cf. *R. v. Harris and Atkins*, 95 O. B. Sess. Prs. 520* 523, per Hawkins, J. (1882).

(*n*) *R. v. White*, 8 Cr. A. R. 3 (1912).

(*o*) Bac. Max., Reg. 15.

In other words, the guilt of an act charged against a prisoner must always depend upon two conditions—(1) that the act in question was prohibited by law, and (2) that, when he did the act, the prisoner knew, or ought to have known, that it was within such prohibition.

These two conditions may be called the condition of illegality (*actus reus*) and the condition of culpable intentionality (*mens rea*).

(1) The former condition is self-evident, for legal culpability must obviously depend upon legal prohibition.

The law might conceivably attach the penal sanction to all such conduct as might be prohibited by a specified code of theology, or to any behaviour that might incur the general reprobation of all respectable people. But everybody knows that the law does no such thing (*p*), and that whatever confusions there may have been, between positive law, religion and morality, in other countries or in other times, the criminal law of England at the present day is confined to the enjoining or prohibiting certain acts specified by the law itself, and not left to be gathered from the doctrines or theories of religious and secular philosophy.

The condition of illegality requires the performance of some act which the law has prohibited, or the omission of some act which it has enjoined; and there is, therefore, no necessity in the present place to inquire into the significance of intention or guilt apart from conduct.

A wicked intention entertained, or resolution formed, to commit a crime in the future, so long as it remains unembodied in outward action, has no legal importance, and need not concern the lawyer (*q*), even if expressed to others (*r*).

The question upon what ethical grounds the sanction of criminal law rests, or what should be regarded as the proper justification of punish-

(*p*) Except, perhaps, in the peculiar case of conspiracy to do an outrageous and immoral act: *R. v. Lord Grey*, 9 St. Tr. 127; *R. v. Orbell*, 6 Mod. 42; *Gregory v. Duke of Brunswick*, 6 M. & G. 205.

(*q*) Aust., Lect. 21; Kenny, Outl., pp. 37-8; *R. v. Higgins*, 2 East, 5 (1801), per Le Blanc, J.; cf. *R. v. Wiley*, 2 Den. 37 (1850), per Platt and Parke, BB. (as to receiving stolen goods).

(*r*) *R. v. Landow*, 29 T. L. R. 375 (1913).

ment, has been the subject of much learned discussion, but there can hardly be room for doubt on such a point in the mind of a lawyer (s).

That the chief and only universal purpose of punishment is prevention, or in other words that the criminal sanction is inflicted chiefly as a deterrent (t), was the recognised doctrine as early as the fifteenth century (u), and must be regarded as little more than a truism, if we accept Austin's definition of law.

The law, while punishing a criminal, may often satisfy a tacit demand by aggrieved persons and scandalised citizens for the retributive treatment of offenders; and no doubt it is true that there is imbedded in the hearts of all right-minded members of the community a sense of justice which cries out for such treatment (x); and on the other hand offenders are now rarely punished without some regard being had or consideration given to the possibility of their reformation; but these are at the most matters of philosophical rather than of legal importance (y).

Prevention is better than cure, and the main object of the criminal law is to prevent or discourage mischievous conduct. It effects that end by operating upon the motives of persons subject to it; and the criminal sanction is nothing more or less than the conditional pain or evil supplying, by anticipation, that motive without which the law would be utterly ineffective (z)—“*ut pœna ad paucos, metus ad omnes perveniat*” (a).

In an early stage of the growth of law retribution was possibly a principal object of criminal justice (b), but it has become of less and less importance as the law has been developed, and on the other hand determent has become of more pressing necessity as the organisation of society has grown more complicated and artificial.

Under the criminal law now in force determent is the one decisive factor in the definition of crime and imputability, although the retri-

(s) Vide Holmes, Lect. 2, pp. 40 et seq.

(t) Salmond, pp. 75—83; Clark, Anal., Chap. I.

(u) Y. B. 3 Hen. 7, f. 1, Hil. pl. 4 (Ken. S. C., 41).

(x) Lilly, Chap. 7; cf. Mercier, Cr. Resp., Chap. I and p. 20.

(y) Cf. Kenny, Outl., Chap. 2; McConnell, Part I

(z) Vide Oppenh., 129, 151, 180.

(a) 3 Inst., 6.

(b) Cf. Mercier, *ub. sup.*, *contra*.

butive or reformatory treatment of an offender may frequently be considered as a matter of importance after conviction (*c*).

(2) The second condition of legal guilt, viz., the condition of culpable intentionality, may be said to be the fundamental doctrine of imputability, and requires more detailed consideration.

In the first place it is to be observed that an immoral (as distinct from an illegal) intention cannot suffice to constitute criminal liability (*d*).

Some doubt seems (*e*) to have been thrown upon this obvious truth by Wills, J., in *R. v. Tolson* (*f*). While stating his reasons for finding that there was no *mens rea* in that case, the learned judge went somewhat out of his way to concede the possibility, in some cases, of guilty intention consisting merely of an intention "to do a thing wrong in itself and apart from positive law" (*g*). This may, however, be disregarded as *obiter dictum*; and in no decided case is any real authority to be found for the idea that moral guilt can suffice, without legal guilt, to constitute criminality.

On the other hand, if a man is guilty of an intention to contravene the law, he cannot plead as an excuse that his conduct was prompted by an ulterior intention or desire to secure an end, or advance an object, to which no legal challenge could be opposed.

This is the plain meaning of the familiar saying that innocence of motive is no excuse for crime—a doctrine established beyond all dispute in *R. v. Hicklin* (*h*), where a man, actuated by religious zeal, sold obscene pamphlets to the public. An order for seizure, made by the justices (*i*), and quashed by the Recorder subject to a case stated upon the point of law, was upheld on appeal, upon the ground that the sale

(*c*) Vide Kenny, Outl., Chap. 32.

(*d*) Vide, as to maintenance, *Fischer v. Kamala Naicker*, 8 Moo. Ind. App. 187, per Sir John Coleridge; appr. *British Cash Conveyors, Ltd. v. Lamson Store Co., Ltd.*, 1908, 1 K. B. 1014, per Buckley, J.; *sed vide Bradlaugh v. Newdegate*, 11 Q. B. D. 10, per Lord Coleridge, C.J.

(*e*) Kenny, Outl., 41-2.

(*f*) 23 Q. B. D. 168 (1888).

(*g*) At p. 172; cf. *R. v. Prince*, 2 C. C. R. 154 (1875), per Blackburn, B., at pp. 176-177.

(*h*) L. R. 3 Q. B. 360 (1868).

(*i*) Under the Obscene Publications Act, 1857 (20 & 21 Vict. c. 83, s. 1).

of the pamphlets, even for the object stated, constituted a misdemeanour. Cockburn, C.J., said :—

“ We must take it, upon the finding of the Recorder, that . . . the motive of the appellant in distributing this publication . . . was honestly and *bona fide* to expose the errors and practices of the Roman Catholic Church in the matter of confession ; and upon that ground of motive the Recorder thought an indictment could not have been sustained, inasmuch as to the maintenance of the indictment it would have been necessary that the intention should be alleged and proved (*k*), namely, that of corrupting the public mind by the obscene matter in question. In that respect, I differ from the Recorder. I think that if there be an infraction of the law the intention to break the law must be inferred, and the criminal character of the publication is not affected or qualified by there being some ulterior object in view (which is the immediate and primary object of the parties) of a different and of an honest character. . . . The question then presents itself in this simple form : may you commit an offence against the law, in order that you may thereby effect some ulterior object which you have in view, which may be an honest and even a laudable one ? My answer is, emphatically No. I think the old sound and honest maxim, that you shall not do evil that good may come, is applicable in law as well as in morals ” (*l*).

The law, then, is concerned to investigate a man's state of mind only in relation to the legal character of his acts, not in relation to their ethical or moral character. Conduct may be blameworthy according to moral principles, and innocent in the view of the law ; or it may be flagrantly illegal, and at the same time morally innocent or even heroic. The question of moral blameworthiness is outside the range of discussion, arising as it does out of an entirely different code of obligations, to which the legal sanction (fortunately for many of us) does not attach (*m*).

But though moral blameworthiness is not, legal blameworthiness undoubtedly is, essential to the commission of a crime ; or, in other words, legal guilt always involves some form of knowledge upon which the sanction of the criminal law can operate, or by means of which it can exert an influence. A crime can be committed only where a

(*k*) Cf. *R. v. Woodfall*, 20 St. Tr. 895 (1770), per Lord Mansfield, at col. 919.

(*l*) At pp. 370-2 ; cf. *R. v. Downes*, 1 Q. B. D. 25 ; *R. v. Senior*, 1899, 1 Q. B. 283 (*post*, Chap. 8) ; *R. v. Booth*, 12 Cox, 231.

(*m*) Holmes, 49—51, 75-6.

person, disobeying the law by act or omission, either knows that his conduct is in contravention of the law, or would have known that fact if he had given to his conduct, and to the circumstances, that degree of attention which the law requires, and which he is capable of giving.

Here arises the importance of the distinction, which has already been pointed out (*n*), between intention consisting of advertence alone and intention consisting of advertence coupled with expectation. As regards culpable intentionality, acts prohibited by the criminal law are primarily divisible into two classes: those which are consummate crimes without any dependence upon their actual or probable consequences, and those which are criminal only in the event of their actually or probably involving certain specified consequences.

In crimes of the former class the element of intention consists of nothing more than advertence, and comprises such knowledge of the circumstances as suffices for the offender to subsume his offence under the law. In such crimes there can be no imperfect intention, the only possible alternatives being full intention (*i.e.*, advertence or knowledge) and absence of intention (*i.e.*, inadvertence or ignorance).

As regards crimes of the latter class, the element of futurity enters into the case, and intention consists not only of advertence to existing circumstances and the subsuming the same under the law, but also of advertence to the particular consequence contemplated by the law in question, and some degree of actual or imputed expectation thereof. This, then, is the field covered by the various forms of imperfect intention, all of which are characterised by the absence of full expectation of a specified consequence.

Various forms of imperfect intention (or *culpa*) are denoted by such colloquial terms as *heedlessness*, *rashness*, *carelessness*, *recklessness*, *temerity*, and *thoughtlessness*, some of them implying a greater measure of opprobrium and others a more liberal allowance of excuse, but all being sharply distinguished from full intention (or *dolus malus*). The best phrase to denote them all is *active negligence*.

(3) QUASI-CRIME.

If the law were in all, or in numerous cases, to inquire into the precise amount of knowledge or degree of expectation entertained by

(*n*), *Supra*, "Intentionality."

persons amenable to its jurisdiction, it would be attempting a task impossible of human performance. Yet the actual guilt or innocence of a man, *in foro conscientie*, depends directly upon his intention, or in other words upon the actual knowledge and degree of expectation in his mind ; and any system of law would command scant respect that openly refused to regard so important an element of conduct.

Confronted with this dilemma, the law has recourse to a system of compromise, embodied in a series of presumptions (o), such as the presumption that a man intends the natural consequences of his own acts ; that every sane man knows the law ; that a man is sane until the contrary is proved ; and that a woman under coverture, when committing a larceny in her husband's presence, acts under his coercion.

Some of these presumptions are conclusive ; others are rebuttable ; but one observation applies to all of them, viz., that they are so many devices, sometimes amounting to legal fictions, used for the purpose of avoiding inquiry into matters of subtlety beyond the cognizance of judge and jury.

When one of the presumptions above referred to is applied in the consideration of a question of imputability, the result may well be to render liable to conviction and punishment a man who has been, in reality, innocent of any intention to break the law. In such a case, although no actual crime has been committed, the law inflicts a pain or penalty in an arbitrary manner, *as if* there had been a crime, imputing guilt where in fact there is no guilt.

Such cases are altogether exceptional, and it can seldom be demonstrated that a man properly convicted has been perfectly innocent, in the sense of having entertained no particle or scintilla of legal blameworthiness.

Where any such case is found to occur, it must always be attributable either to a legal presumption, grounded upon general impracticability of proof, and existing at common law, or else to some extraordinary provision of statute law, creating, in effect, what may be called a *quasi-crime*.

It is a familiar doctrine that an Act of Parliament can do anything. The law recognises no limits to its power, but such limits exist in fact. Even an Act of Parliament cannot make a man really guilty of a

(o) Taylor, *Ev.*, Vol. I., Chap. 5.

particular offence, when he is in fact innocent of any degree of intention to break the law.

But an Act of Parliament can require all Courts and all persons to treat such an individual in all respects *as if* he were guilty, however innocent he may be in reality. This is precisely what certain modern statutes have done, with the result that, in connection with certain prohibitions, as to adulteration of food, sale of liquors and a few other matters, innocent people are occasionally "convicted" in a criminal court in the same manner, and with the like consequences, as if they were guilty of the specified crimes charged against them.

In all such cases the justification of the arbitrary interference with liberty is precisely similar to the justification of all the common law presumptions above referred to, viz., the difficulty which would ensue, or which it has been thought would ensue, in enforcing the statutory provisions in question, if the existence or absence of culpable intentionality were inquired into.

(4) MENS REA.

The maxim familiar to English lawyers, that there can be no crime without a guilty mind (*p*), amounts, when properly used, to no more and no less than that all crime is characterised by, and necessarily involves, some form of culpable intentionality. In other words, it "means no more than that the definition of all or nearly all crimes contains not only an outward and visible element, but a mental element, varying according to the different nature of different crimes" (*q*).

This maxim was somewhat severely criticised by Stephen, J., in *R. v. Tolson* :—

"Though this phrase (*non est reus nisi mens sit rea*) is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading, on the following grounds. It naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a *mens rea* or guilty mind, which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. *Mens rea* means in the case of murder malice aforethought, in the case of theft an intent to steal, in the case of rape an intent to have forcible connection with a woman without her consent, and in the case of receiving stolen goods knowledge that the goods are stolen. In some cases it denotes mere

(*p*) 3 Inst. 6.

(*q*) St. Hist., v. 2, p. 94.

inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name. It seems contradictory indeed to describe a mere absence of mind as a *mens rea* or guilty mind. The expression again is likely to and often does mislead. To an un-legal mind, it suggests that by the law of England no act is a crime which is done from laudable motives, in other words that immorality is essential to crime. It will I think be found that much of the discussion of the law of libel in *Shipley's Case* (r) proceeds upon a more or less distinct belief to this effect. . . . Like most Latin maxims, the maxim on *mens rea* appears to me to be too short and antithetical to be of much practical value. It is indeed more like the title of a treatise than a practical rule. I have tried to ascertain its origin, but have not succeeded in doing so. . . . The earliest case of its use which I have found is in the *Leges Henrici Primi* (s), in which it is said: *Si quis per coactionem abjurare cogatur quod per multos annos quiete tenuerit, non in jurante sed in cogente perjurium erit. Reum non facit nisi mens rea.* . . . The principle involved appears to me, when fully considered, to amount to no more than this. The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime as defined is not committed or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition" (t).

One hardly seeks in a Latin saw the complete exposition of a complex legal theory; but the wide use of the maxim in our trials for centuries past has at any rate had the good result of familiarising English lawyers with the principle embodied in it, though that principle may be comprehended by unthinking people only in a vague and shadowy manner.

There is no real contradiction in describing a mere absence of mind as a *mens rea* or guilty mind. "Absence of mind" is a colloquial phrase for inattention, and a mind which is guilty of inattention, by not thinking of a particular matter when it ought, may well be described as a guilty mind, or a mind at fault.

Nor is it really "confusing to call so many dissimilar states of mind by one name." On the contrary, the chief merit of this maxim is that it denotes concisely the common characteristic of the various states of mind falling within its scope, viz., that they are all blameworthy

(r) 21 St. Tr. 847.

(s) V. 28.

(t) Per Stephen, J., *R. v. Tolson*, 23 Q. B. D. 185-7.

forms of intentionality, consisting either of intent to break the law, or of inattention to a matter where the law requires attention thereto.

Stephen, J.'s, criticism lacks that precision which usually characterised his judgments and writings. Instead of saying that *mens rea* means, in the case of murder, malice aforethought, in the case of theft an intention to steal, and so forth, it would have been more correct to say that it *includes* those states of mind respectively, as being comprised in a general intention to break the laws which prohibit the criminal acts in question.

If that general intention be analysed, it will be found in all cases to involve, first a knowledge of the facts essential to the crime, secondly an actual or presumed knowledge of the law, and thirdly a subsuming, or ranging, of those facts under that law, or the possibility of that process, given due attention.

The extreme limit of *mens rea* in the direction of veniality may be defined by reference to the judgments of the majority of judges in *R. v. Prince (u)*, from which it seems to follow that *mens rea* cannot be rigidly identified with a *criminal* intent, as Brett, J., wished more logically to identify it, but may consist, in cases involving mistake of fact, merely of an intention to do a wrongful or tortious act, short of a crime (*x*).

This doctrine was clearly laid down by Denman, J., who said that a man who does an act which he knows to be illegal in the sense of amounting to a tort or civil wrong, but which he does not know to be (in the circumstances of the case) criminal, "cannot set up a legal defence by merely proving that he thought he was committing a different kind of wrong from that which in fact he was committing."

A fortiori, a man may commit one crime when intending to commit, not that crime, but another crime of the same nature, of equal or greater degree of heinousness.

In general, where acts are done with the intention of committing one felony, but through some unforeseen event or otherwise result in

(u) L. R. 2 C. C. R. 154 (1875); vide per Blackburn, J., pp. 172-3; per Bramwell, B., 175-7; per Denman, J., 179; cf. per Brett, J., 169.

(x) Cf. the law of conspiracy, vide *Vertue v. Lord Olive*, 4 Burr. 2473 (1779), *et ante*.

the commission of another felony not intended or contemplated by the offender, the discrepancy between the facts occurring and the facts intended will not affect ordinary *mens rea*, consisting of the general intention to break the law :—

“*In criminalibus sufficit generalis malitia intentionis cum facto paris gradus*” (y).

Two or three good examples of this doctrine were given in one of the judgments just cited :—

“A man was held liable for assaulting a police officer in the execution of his duty, though he did not know he was a police officer. Why ? Because the act was wrong in itself. So also, in the case of burglary, could a person charged claim an acquittal on the ground that it was just past six when he entered ? Or, in house-breaking, that he did not know the place broken into was a house ?” (z).

It is otherwise, however, where, according to the correct definition of a crime, intention of a particular consequence is requisite to constitute *mens rea*.

In some such cases, *e.g.*, murder, the special intention required by the definition of the crime must be “intent,” or full intention of the consequence forming the mischief of the offence ; in others, it may consist of some slighter degree of expectation. But, whatever degree of intention be requisite, it must (*ex vi definitionis*) refer to the particular consequence which is essential to the crime, and not merely to some other consequence, whether similar or dissimilar thereto (a).

The only departure from this rule is under the exceptional doctrine of constructive homicide, which rests upon somewhat doubtful authority, and is at variance with the general tendency of modern criminal administration.

Modern statutes frequently make a fraudulent intention essential to the commission of a particular crime. This may be effected either by express words or by implication (b). In many such cases intent to defraud may, for all practical purposes, be regarded as identical with *mens rea* ; but in truth the intent to defraud (c) is only a part of the

(y) Bac. Max., Reg. 15.

(z) *R. v. Prince*, per Bramwell, B., *ub. sup.*

(a) *R. v. Pembilton*, L. R. 2 C. C. R. 119 (1874) ; vide *post*, Chap. IX.

(b) Vide *R. v. Entwistle*, 1899, 1 Q. B. 846 (Vagrancy Act, 1824, fortune-telling).

(c) Vide *R. v. Bennett and Newton*, 9 Cr. A. R. 146, 154 (1913).

mens rea. It is a mental element of such importance that, once proved, it must almost always dispose of any defence on the ground of absence of *mens rea*. On the other hand, where no fraudulent intention exists, an essential element of the crime is wanting (*d*), and there is no complete *mens rea*.

But where intent to defraud is *not* included in the definition of a crime, although the crime may be one usually associated with fraudulent intent, such an intent is not essential (*e*).

This distinction was well illustrated in an action for malicious prosecution under a colonial enactment creating certain liens and mortgages upon sheep and wool, and forbidding the sale of the animals without the consent of the persons interested in such liens. After reciting that it was expedient to surround such liens "with the penal provisions necessary for the punishment of frauds," the enactment provided that "any grantor of any such preferable lien . . . who shall afterwards by the sale or delivery of the wool under any such lien without the written consent of the lienee . . . with a view to defraud such lienee of such wool or of the value thereof, or who shall after the execution and registry of any such mortgage without the written consent of the mortgagee thereof, sell . . . any sheep . . . mentioned in any mortgage" should be guilty of a misdemeanour. The respondent had, without any intent to defraud, and with the oral consent of the mortgagees, sold certain sheep upon which the prosecutors had a duly registered mortgage. Upon appeal, the Privy Council held that an intent to defraud was not an element of the statutory offence charged (*f*):—

"The circumstances of the present case are far from indicating that there was no *mens rea* on the part of the respondent. He must be presumed to have known the provisions of section 7. Then he knew that he had not the written consent of the mortgagee; and that knowledge was sufficient to make him aware that he was offending against the provisions of the Act, or, in other words, was sufficient to constitute what is known in law as *mens rea*" (*g*).

(*d*) *El.g.*, in false pretences: *R. v. Ferguson*, 9 Cr. A. R. 113 (1913).

(*e*) The Forgery Act, 1913, distinguishes between "intent to defraud or deceive" and "intent to defraud" alone (ss. 2—5).

(*f*) *Bank of New South Wales v. Piper*, 1897, A. C. 383.

(*g*) Per Sir Richard Couch, at pp. 389—390.

In a case under the Merchandise Marks Act, 1887 (*h*), where the Court quashed a conviction for selling goods to which a false trade mark was applied, Channell, J., said :—

“It seems to have been contended before the magistrate that the state of mind of the seller to the purchaser was material, as regards a prosecution for this offence, and that in order to establish his innocence it was sufficient for him to shew that he did not intend to defraud the purchaser. That seems to me to have been a false point. The innocence contemplated by the Act is innocence of any intention to infringe the Act of Parliament, and that is the point which I think the magistrate ought to have considered. . . . The decision of the magistrate proceeded on a wrong ground” (*i*).

So also, under a statute prohibiting the “possession without lawful excuse” of a die for making a false stamp (*k*), it was held that an offence was committed by the conscious possession of such a die for any purpose, however innocent or uncoloured by fraud it might be, *e.g.*, for the purpose of making black and white illustrations in a stamp catalogue (*l*).

These cases are cited as illustrations of the difference between *mens rea* and fraudulent intent. Where, according to the definition of a crime, fraudulent intent or some other special form of intentionality is an essential ingredient in *mens rea*, it is very easy to be misled into the idea that they are identical. As has been seen, even so eminent an authority as Stephen, J., fell into this error, which vitiates the whole of his criticism of the established maxim of *mens rea*, embodying the most important of all the doctrines of imputability according to the law of England.

It may well become a matter of the utmost importance, where there is such a special ingredient in a crime, that it should not be magnified into identity with the *mens rea* of which it really forms only a part. For instance, a lunatic may well be capable of forming a clear intent to defraud or a full homicidal “malice,” or intent to kill, and yet be quite incapable of *mens rea*, so as to be entitled to an acquittal of the crime of forgery or murder, as the case may be. Even in the case of a sane man, it is quite conceivable that there may be circumstances in which, although the intent to defraud, or other special mental

(*h*) 50 & 51 Vict. c. 28, s. 2 (2).

(*i*) *Christie, Manson and Woods v. Cooper*, 1900, 2 Q. B. 522.

(*k*) Post Office (Protection) Act, 1884, s. 7 (c); now Post Office Act, 1908, s. 65.

(*l*) *Dickens v. Gull*, 1896, 2 Q. B. 310.

element of the particular crime charged, may clearly have been entertained, some other ingredient of *mens rea* may be found to have been entirely lacking.

It remains to distinguish fraudulent intent, or any other special mental element which may be essential to a crime as part of the *mens rea*, from the motive of profit or other motive which may usually accompany it (*m*).

Larceny under our law need not, like *furtum* under the old Roman law (*n*), be committed *lucri causa* (*o*), nor is the motive of profit an essential element in an intent to defraud, any more than the motive of hatred is essential to wilful murder.

A company entered into a contract to supply the War Office with gunpowder on certain specified dates. By an explosion they were prevented from manufacturing the powder in time; and they therefore bought German powder, of equal value and efficiency, put it into the Government barrels, and put their own labels on the barrels, as if the powder had been of their own manufacture. They were held to have acted with intent to defraud (*p*), and Lord Coleridge, C.J., said:—

“I agree that if the word is used in the sense of putting off a bad article on a customer in order to get money unfairly, there is no evidence here of anything of the kind having been done. . . . The Act (*q*) is directed against the abuse of trade marks, and the putting off on a purchaser of, not a bad article, but an article different from that which he intends to purchase, and believes that he is purchasing. It would apply to cases where a particular article, manufactured by a particular person, had acquired a wide-spread reputation, as for instance happened in the celebrated case of the fish-sauces (*r*), and someone supplied another and a different article under that name, so as to make the purchaser take something which he did not know he was taking. That, I think, is the meaning of the word *defraud*, as used in this Act of Parliament, and in that sense only there was in the present case an intent to defraud.”

(*m*) *R. v. Wilkinson*, R. & R. 470 (1821), as to larceny.

(*n*) Dig. 47, 2, 1, 3; cf. Sandars on Just. Inst., IV., 1, 1.

(*o*) *R. v. Cabbage*, R. & R. 292 (1815); *R. v. Jones*, 1 Den. 188 (1847).

(*p*) *Starey v. Chilworth Gunpowder Co.*, 24 Q. B. D. 90 (1889).

(*q*) 50 & 51 Vict. c. 28, s. 2 (1).

(*r*) *Burgess v. Burgess*, 3 De G. M. & G. 896.

From the foregoing examination of the conception of *mens rea*, it will be seen that it consists of nothing more or less than an intention to break the law.

More precisely, it consists of knowledge, or neglect of available means of knowledge, that one's act is, or may be, in contravention of the law of England.

This definition, properly considered, covers all cases ; but it has to be remembered that the law requires different degrees of attention to circumstances, in connection with the various crimes to which *mens rea* has reference ; and that *mens rea* often involves either full intent of a particular consequence, forming the mischief of a crime, or some slighter degree of intention with regard thereto, such as carelessness.

Mens rea is not dependent upon bad motive, and has nothing to do with the moral complexion of conduct.

It is not to be identified with, though it sometimes includes, the particular intention of a special consequence, *e.g.*, an intent to defraud, which may be rendered essential to a crime by its definition. Finally, such special ingredients in *mens rea*, whenever they occur, are (as forms of intentionality) to be kept distinct from, and not regarded as necessarily involving, the motives or desires which may usually accompany them.

Mens rea is generally presumed until its absence is proved ; for " in most cases the law regards the criminal act itself as sufficient *prima facie* proof " of *mens rea* (s).

In all cases of doubt the existence or absence of *mens rea* is a question of fact for the jury, whose decision will not be reversed unless clearly unreasonable (t).

(5) GROUNDS OF NON-IMPUTABILITY.

When is a crime not a crime ? In other words, for what reasons may a person be entitled to an acquittal in respect of conduct (or what appears to be conduct) which would, but for such reasons, render him liable to conviction ?

The first writer to consider this problem, and to examine in detail the various grounds of exemption from punishment, was Lord Hale. His account of the matter amounted to this, that all occasions of immu-

(s) Kenny, *Outl.*, 41.

(t) *R. v. Phillips*, 2 Cr. A. R. 295 (1909).

nity from conviction were referable to a single reason, viz., the absence of culpable intention, and that any classification dealing with the subject could affect only the different causes which might render a person incapable of entertaining such intention.

“Man is naturally endowed with these two great faculties, understanding and liberty of will, and therefore is a subject properly capable of a law properly so called, and consequently obnoxious to guilt and punishment for the violation of that law, which in respect of these two great faculties he hath a capacity to obey. The consent of the will is that, which renders human actions either commendable or culpable; as, where there is no law there is no transgression, so regularly where there is no will to commit an offence there can be no transgression, or just reason to incur the penalty or sanction of that law instituted for the punishment of crimes or offences. And because the liberty or choice of the will presupposeth an act of the understanding to know the thing or action chosen by the will, it follows that, where there is a total defect of the understanding, there is no free act of the will in the choice of things or actions. But general notions or rules are too extravagant and undeterminate, and cannot be safely in their latitude applied to all civil actions; and therefore it hath been always the wisdom of states and lawgivers to prescribe limits and bounds to these general notions, and to define what persons and actions are exempt from the severity of the general punishments of penal laws in respect of their incapacity or defect of will.

“Those incapacities or defects that the laws, especially the laws of England, take notice of to this purpose, are of three kinds: I. Natural, II. Accidental, III. Civil incapacities or defects.

“The natural is that of infancy.

“The accidental defects are: 1. Dementia, 2. Casualty or chance, 3. Ignorance.

“The civil defects are: 1. Civil subjection, 2. Compulsion, 3. Necessity, 4. Fear” (*u*).

In this passage Hale refers all grounds of immunity to “defect of the will,” whether caused by a defect of the understanding or otherwise. The ambiguous word *will* was much employed by the writers of former times, whose notions of psychology were as hazy as their laws were harsh. What Hale here describes as the consent of the will, and defines as that which renders human action either commendable or culpable, is nothing more or less than intentionality as already defined, in rela-

(*u*) Hale, Chap. 2, cf. Bl. Comm., IV., Chap. 2.

tion to the legal or illegal character of an act, and (in some cases) in relation to the known or anticipated consequences of an act.

The principle of intentionality is, in fact, the main principle underlying normal liability to the criminal sanction ; but it does not cover all the ground which we shall have to examine, or account for all the minor or subsidiary principles which are applied in questions of criminal responsibility.

Apart from this objection, the passage above quoted does not afford either a consistent or a useful division of the subject.

On the one hand, it is as " natural " for a lunatic to be silly as for a child to be young. On the other hand, infancy is as " accidental " or temporary as madness or ignorance, both of which are in some people innate and invincible.

Again, both infancy and lunacy are, like civil subjection, matters of status ; whereas compulsion, necessity and fear, having no necessary connection with status, are clumsily described as " civil defects." They would be more properly classified as " accidental," arising as they do merely out of the facts and circumstances of particular occasions.

A modern jurist gives the following account of imputability, which, though more reasonable than that of Hale, is hardly more practically useful, being directed to the dissection of imputability rather than to the classification of excuses :—

" In order that an act may by the law of England be criminal, the following conditions must be fulfilled :—

" 1. The act must be done by a person of competent age.

" 2. The act must be voluntary, and the person who does it must also be free from certain forms of compulsion.

" 3. The act must be intentional.

" 4. Knowledge in various degrees, according to the nature of different offences, must accompany it.

" 5. In many cases, either malice, fraud or negligence enters into the definition of offences.

" 6. Each of these general conditions (except the condition as to age) may be affected by the insanity of the offender.

" Crimes by omission are exceptional, and the points in which they differ from crimes by act will be noticed incidentally " (x).

(x) St. Hist. II. 97 ; Gen., V., p. 68.

Here, the various conditions of imputability, though stated as if they were so many distinct factors, in reality overlap one another.

For instance, the three conditions of competent age, intention and knowledge are three several applications, to varying circumstances, of one and the same principle, that there can be no crime unless the party might, or ought to, know that his conduct was unlawful.

Stephen correctly stated the ingredients of normal culpability with special reference to the problems arising out of insanity, but he made no attempt to supply a classification of the principles underlying imputability in a more general sense.

For a more systematic outline we must turn to the scheme for a criminal code set out in the "Notes on Criminal Law" at the end of Austin's Lectures (*y*), where six leading principles are laid down, by way of a classification of the various grounds of exemption or non-imputability under our law :—

1. "An act or omission is not a crime (or is not imputable to the party) unless the party knew, or with due attention might have known, that under the circumstances of the fact it was a crime; or, an act or omission is not a crime (or is not imputable to the party) unless the party subsumed the fact, or with due attention might have subsumed the fact, under the law."

2. "An act or omission is not a crime if it be purely involuntary, *i.e.*, if the not doing the act done, or the doing the act omitted, did not depend anywise on the wishes (or will) of the party."

3. "Generally, an act or omission is not a crime, or is more or less excusable, if it proceeded from an instant and well-grounded fear, stronger than the fear naturally inspired by the law."

4. "An act or omission pursuant to a legal duty is not a crime."

5. "An act or omission pursuant to a legal right or to a permission or license granted or authorised by the law is not a crime."

6. "An overt act (or such an act, other than a confession of the party, as indicates criminal knowledge) is of the essence of a crime by commission; also of a crime by omission accompanied with criminal knowledge."

These six principles, which are in the nature of axioms, appear to cover all exemptions from criminal liability allowed in respect of conduct amounting outwardly to an infraction of the law.

(*y*) Pp. 1057—1061.

In two respects they go somewhat beyond the scope of the present treatise.

The fourth principle covers justification arising out of the exercise of a legal duty, *e.g.*, in the arrest of a criminal or in the execution of a judgment or sentence. The chief application of such a plea is to the conduct of public servants in the due performance of their official functions. Such matters properly fall under the law of public status (z), rather than under the more general matter here to be dealt with. In so far as it relates to matters of general interest, the plea of justification by virtue of legal duty may well be regarded, and will accordingly be dealt with, as falling within the wider plea of justification by virtue of a legal right or licence; for whenever the law imposes a duty, it necessarily confers a right to carry out that duty.

The last of the principles above quoted is concerned with that peculiar doctrine of the English law which requires—with a possible exception in the case of some forms of treason (a)—proof of an overt act of crime, before allowing any person to be punished in respect of criminal intentionality. As there can be no criminal act without *mens rea*, so there can be no punishable *mens rea* without an overt act (b). The full consideration of this doctrine would involve the discussion of various subjects falling more properly under the law as to attempts, as to principals and accessories, and as to confessions and other matters of evidence, than under the heading of *mens rea*.

Leaving these matters therefore out of account, we may classify under Austin's remaining four principles the various general grounds of immunity afforded by our legal system to persons whose conduct, objectively considered, is or appears to be in contravention of the criminal law.

I. *Absence of Intentionality.*

The principle that an act or omission is not imputable to the party unless he subsumed, or with due attention might have subsumed, the fact under the law, is not only the first in order, but is also by far the most important of the general doctrines underlying criminal liability.

In order to subsume the facts under the law, an offender must both know the material facts in their true relation to his conduct and be

(z) Vide Chaster.

(a) Vide Clark, *Anal.*, p. 15.

(b) Kenny, *Outl.*, 37-8.

acquainted with the law under which his conduct is forbidden. The first two matters for consideration will therefore be, in what cases and to what extent ignorance of fact may form an excuse for crime (c), and for what reasons and to what extent all persons are bound by the presumption as to legal knowledge (d).

These two points having been disposed of, it will be necessary to consider the position of persons rendered incapable of the mental process necessary to subsume the facts under the law, whether by reason of infancy, insanity, or drunkenness (e).

Again, the party whose conduct is in question may, in performing or failing to perform the mental process above referred to, have been guilty of inattention or negligence. It will therefore be necessary to examine the degrees of intentionality, with reference both to active crimes (f), and to criminal omissions (g).

The last matter for inquiry under the principle of intentionality will be the exceptional doctrine of constructive homicide, under which a crime depending upon the happening of a particular consequence, and also depending in all ordinary circumstances upon the offender's fully intending that consequence, may (according to the older authorities) in some cases be committed without any actual intention of that consequence being entertained by him (h).

II. *Absence of Volition (i).*

The principle that an act or omission is not imputable to the party if it depended in no degree upon his wish or choice is as much in the nature of an axiom as the principle of intentionality; and there are fewer exceptions to its recognition by the law of England.

It covers all acts done under absolute compulsion, *i.e.*, under such force or stress, or in such circumstances, that the party charged had no opportunity of choosing between guilt and innocence.

Such cases fall into two categories, according as the compulsion arises from natural causes alone, or from human intervention or agency.

(c) Chap. II.
 (d) Chap. III.
 (e) Chaps. IV., V., VI.
 (f) Chap. VII.

(g) Chap. VIII.
 (h) Chap. IX.
 (i) Chap. X.

Thus, the state of "automatism," which sometimes arises during natural sleep, is an instance of *natural compulsion*, by reason of which exemption could be claimed in respect of any acts done under its influence. On the other hand, the state of hypnotic or post-hypnotic "sleep" has been alleged frequently to confer upon a hypnotist such an entire dominion over the subject's mind, and so completely to deprive the latter of any independent choice of action, as to justify the plea of *human compulsion* in respect of crimes committed under its influence.

The greatest difficulty arising in the application of the principle of compulsion is in connection with the much debated question whether, apart from any intellectual insanity, a morbid impulse towards crime (sometimes called "irresistible,"—an adjective which begs the question) can be satisfactorily proved to exert such a control over a man's mind as to render him utterly helpless under its influence and to deprive him completely of any choice of action. If so, he would cease to be a free agent, and would be excused by the complete absence of any volition, or choice between guilty and innocent conduct.

III. *Overwhelming Fear (k).*

This principle is of limited and doubtful application in our law, and might with advantage be abolished.

To it are referable the extremely rare defence of threats and menaces by the King's enemies; and the absurd doctrine as to the presumption of duress of persons under coverture.

The importance of this principle has been exaggerated by some eminent writers, notably by the late Sir J. F. Stephen, who was disposed to extend its application generally to cases of alleged natural "necessity."

IV. *Occasional Excuse (l).*

The principle that an act or omission pursuant to a legal right or duty, or to a permission or licence granted or authorised by the law, is not a crime covers the pleas of:—Self-defence and Self-assistance; Provocation (a partial defence only); Advancement of Justice; Prerogative and Privilege; and Consent.

(k) Chap. XI.

(l) Chap. XII.

All these defences, though arising out of widely different circumstances and considerations, are properly referable to the principle that the act or omission in question was strictly pursuant to, and within the limits of, a right or duty conferred or imposed upon the party by the law. In short, a thing cannot be both right and wrong.

The defence of provocation cannot indeed be said to fall strictly within the principle in question, inasmuch as it is a partial defence only, mitigating the guilt of homicide from that of murder to that of manslaughter; but by analogy it falls more nearly under this principle than under any of the remaining principles of non-imputability.

It will be necessary to exclude from consideration, except so far as they may have to be touched upon incidentally, various matters which at first sight appear to lie within the scope of the present work, but which are in fact more properly and conveniently included in other branches of the law.

Such are—the law concerning attempts (*m*); the law of principals and accessories (*n*); and the special mental elements required for the commission of various particular offences, e.g. the *animus furandi* in larceny, or in burglary the intent to commit a felony in the house broken into (*o*).

The limits of criminal jurisdiction (*p*), informalities in indictments, the pleas of *autrefois acquit* (*q*) and *autrefois convict*, the admissibility of evidence to show *mens rea*, and the limitation of proceedings under the Public Authorities Protection Act, 1893 (*r*), and other enactments (*s*), and the requirement of the Attorney-General's fiat for certain criminal proceedings (*t*), are all matters of adjective rather than of substantive law.

The question in what cases a corporate body is subject to prosecution

(*m*) Vide Aust., pp. 1062-3.

(*n*) Aust., p. 1064; et vide *R. v. Bolster*, 3 Cr. A. R. 81 (1909); *R. v. Lomas* 78 J. P. 152 (1913).

(*o*) *R. v. Wood*, 76 J. P. 103 (1911).

(*p*) *McLeod v. Att.-Gen. for New South Wales*, 1891, A. C. 455.

(*q*) *R. v. Barron*, 1914, 2 K. B. 570.

(*r*) 56 & 57 Vict. c. 61.

(*s*) Perjury Act, 1911; et vide Lightwood, Chap. 9.

(*t*) Vide *R. v. Davies*, 77 J. P. 279 (1913).

for an offence, either at common law (*u*), or under a statute (*x*), is another subject which seems to lie outside the scope of a work dealing with *mens rea*, as it is governed by considerations entirely distinct from those regulating imputability in general (*y*). At common law, the question merely resolves itself into this: whether the act done or omitted is one which a corporate body can do (*z*). If not, it cannot be convicted of doing, or of not doing, it. The same consideration applies to statutory crimes (*a*), but in the case of such as are punishable otherwise than by fine there frequently arises the further consideration that a corporation has, according to the current phrase, neither a soul to be saved nor a body to be chastised. On that ground it was recently held to be impossible to treat a joint-stock company as a corporate or collective rogue and vagabond (*b*).

Another curious form of exemption from criminal liability, governed by no general principle, is the immunity of certain misdemeanants (*c*) wherever their offence has been first disclosed on their own oath in an action or other legal proceeding instituted *bona fide* by an aggrieved party.

(*u*) Vide *Wyche v. Mead*, 3 Peere Wms. 310; *R. v. Birmingham and Gloucester Railway*, 9 C. & P. 478; *R. v. Great North of England Railway*, 2 Cox, 70; *R. v. Tyler and International Commercial Co., Ltd.*, 1891, 2 Q. B. 588.

(*x*) 52 & 53 Vict. c. 63; *Eastern Counties Railway Co. v. Broom*, 6 Ex. 314; *Pearks v. Ward*, 1902, 2 K. B. 1; *Evans & Co., Ltd. v. London County Council*, 30 T. L. R. 509 (1914).

(*y*) *Kenny, Outl.*, 62-4.

(*z*) *R. v. Great North of England Railway*, *ub. sup.*, per Lord Denman, C.J.

(*a*) *Chuter v. Freeth and Pocock, Ltd.*, 1911, 2 K. B. 832; *R. v. Puck & Co., Ltd.*, 76 J. P. 487 (1912).

(*b*) *Hawke v. E. Hulton & Co., Ltd.*, 1909, 2 K. B. 93; cf. *R. v. Gainsford*, 29 T. L. R. 359 (1913).

(*c*) Under sections 77 to 85 of the Larceny Act, 1861, and section 1 of the Larceny Act, 1901; vide *R. v. Noel*, 49 L. J. N. 469 (1914).

CHAPTER II.

IGNORANCE OF FACT.

IN the course of his admirable judgment in *R. v. Prince* (a) Lord Esher, then Brett, J., said :—

“I come to the conclusion that a mistake of fact, on reasonable grounds, to the extent that if the facts were as believed the acts of the prisoner would make him guilty of no criminal offence at all, is an excuse, and that such excuse is implied in every criminal enactment in England.”

That would be a plain and excellent rule, but unfortunately it is gleaned from the one dissenting judgment in the important case quoted, and is at variance with the conclusions arrived at by the fifteen remaining judges in the same case.

If, however, the words *legal wrong* (which would include a tort) be substituted for the words *criminal offence*, the amended definition may be accepted as stating with tolerable correctness the normal doctrine of *ignorantia facti* according to the law of England.

The real underlying principle is better expressed in the axiom that an act is not a crime unless the party subsumed the fact under the law, or might *with due attention* have done so. If it be objected that the words italicised beg the question which has to be considered, or leave one little wiser than before, the answer is that one must not expect too much from mere statements of general principle, which seldom suffice for the solution of particular cases, but serve merely to indicate that path of inquiry which will lead to a correct solution.

Although it is true that an utterly unreasonable mistake, or crass ignorance of fact, can never afford a valid excuse for a criminal offence (b), the words “with due attention” afford a better guide than “on reasonable grounds” to the source of the numerous problems underlying *ignorantia facti*, viz., the important consideration that the law requires

(a) 2 C. C. R., at p. 170 (1875); cf. *R. v. Tolson*, 23 Q. B. D., per Stephen, J., at p. 188 (1889).

(b) Vide Kenny, *Outl.*, 66-7.

different degrees of attention and inquiry in different cases, and usually affords no express indication of the precise, or even of the approximate, degree required (c).

In some cases the degree of diligence with which a man is expected to ascertain facts is so strict that he may be said to act at his peril. In other words, there is a conclusive presumption that he knew the facts, so that the doctrine of *ignorantia facti* has, in such a case, no practical application.

The plea of ignorance ought properly to be considered as possibly involving, in any case where it is set up, three distinct questions : (1) What degree of inquiry into the fact was exigible by law ? (2) Did the defendant comply with that standard, and so entitle himself to plead ignorance ? (3) In spite of due inquiry and attention, was the defendant actually ignorant of essential facts ?

Where the degree of care required by law is so high that the prisoner may be said to act at his peril, the second and third questions obviously become superfluous. In such a case, provided there be actual and unavoidable ignorance of essential fact, there can be no true crime.

Where a statute prohibits an act in an absolute manner, irrespectively of any question of culpable intention, *e.g.*, in such a way that a master is held responsible in the criminal courts for the wilful or negligent acts of his servants which he could by no practicable means have prevented, and where a penalty is inflicted upon a man for a matter entirely beyond his hindrance, a crime cannot truly be said to have been committed.

Although the penalty may be enforceable in a criminal court, the occurrence giving rise thereto, not being attributable to the defendant's conduct or choice, can at most be termed a quasi-crime, *i.e.*, a matter treated by law in the same manner *as if it were* a crime or offence.

Doubtless the distinction of quasi-crime from true crime, however sound in principle, would in practice be rightly considered pedantic. The act is to all intents and purposes treated as a crime ; and the drawing of such a distinction in a particular case (even if it were useful or desirable) would involve the necessity of diving into the mind of the defen-

(c) Cf. Clark, *Anal.*, 32-3.

dant, to make sure that he was in fact perfectly innocent. For in many cases of what would at first sight appear to be no more than quasi-crimes, the act or conduct of the defendant is accompanied by some degree of negligence or culpability, the existence of which, however slight or remote it may be, is sufficient to justify the punishment of the conduct as truly criminal.

The Courts have always been extremely chary of reading into Acts of Parliament an implied intention to treat perfectly innocent people as if they were guilty, but they have shown less reluctance in construing statutes as casting upon the defendant the onus of proving a higher degree of care and diligence than that ordinarily exigible, in dealing with certain specified matters specially provided for by the Legislature.

In all cases a departure from the ordinary doctrine of *mens rea*, whereby *bona fide* mistake on reasonable grounds is an excuse for crime, must be justified by the express terms of a statute or by necessary implication.

The applicability of the ordinary doctrine is, in statutory crimes, sometimes marked expressly by the insertion in the statute of such words as *knowingly* (d), or *wilfully* (e), or *knowingly and wilfully* (f). These special forms of enactment may have the effect of imposing on the prosecution the necessity of proving *mens rea*, which would otherwise be presumed (g). Where, however, such words do not appear, it by no means follows that guilty knowledge is not essential to the commission of a statutory crime. Such a conclusion has been arrived at by the Courts only in a few cases (and then only with reluctance) where it has been thought to be necessitated by a plain construction of the enactment in question, or by some peculiarity in the scope or object of the statute.

“The true rule is to take the words used in their ordinary and natural sense, and to construe them accordingly, without reference to any supposed intention of the Legislature which cannot be gathered from the natural and ordinary meaning of the words” (h).

(d) Vide, e.g., *Twycross v. Grant*, 2 C. P. D. 469; *Cooper v. Whittingham*, 15 Ch. D. 501

(e) Perjury Act, 1911, s. 4 (1); vide *R. v. Ryan*, 78 J. P. 192 (1914).

(f) *R. v. Clarke*, 16 L. T. 429 (1867).

(g) Cf. *Sherras v. De Rutzen*, per Day, J., etc., *infra*.

(h) Per Stephen, J., *Mallinson v. Carr*, 1891, 1 Q. B. 48, at p. 52.

(1) THE GENERAL DOCTRINE.

In numerous cases our Courts have recognised and defined the normal doctrine that, at common law, and under all statutes except such as exclude the rule by express or implied provision to the contrary, an honest and reasonable belief in the existence of circumstances which, if true, would make the act for which a man is indicted innocent and lawful is a good defence to the indictment.

Levett's Case (i) decided that a man who, intending to strike a burglar in his house, *se et sua defendendo*, strikes and kills a person not in fact a burglar is no felon, but is in the same position as if he had in fact killed a burglar, the act being attributable to an error which could not have been prevented by any inquiry practicable in the circumstances.

The same reason justified, under Roman law, the more barbarous pronouncement of Ulpian: "*Si quis hominem liberum ceciderit, dum putat servum suum, in ea causa est, ne injuriarum teneatur*" (k).

Upon the construction of an old bankruptcy Act (l), whereby it was made an offence for a man to depart from his dwelling-house to the intent *or whereby* his creditors might be defeated or delayed, it was held that the word *or* must be read as if it were *and*, because "the intent and the act must both concur, to constitute the crime" (m).

In *R. v. Sleep* (n) it was held that a man could not be convicted of being in possession of Government stores, marked with the broad arrow, in the absence of sufficient evidence to show that he knew them to be so marked; and Cockburn, C.J., said:—

"It is a principle of our law that to constitute an offence there must be a guilty mind; and that principle must be imported into the statute."

Where, upon a charge of sending oil of vitriol by railway without marking or stating the nature of the goods, the justices refused to convict, because the defendant had used all proper diligence, and acted under the belief that the goods were correctly described, the Court upheld that decision, on the ground that there was no criminal state of mind (o).

(i) Cro. Car. 538; Ken. S. C. 26 (1638).

(k) Dig. 47, 10, 3, 4.

(l) 1 Jac. 1, c. 15.

(m) *Fowler v. Padget*, 7 T. R. 509 (1798), per Lord Kenyon, C.J., at p. 514.

(n) 8 Cox, 472 (1861); under 9 Will. 3, c. 41, s. 2; following *R. v. Cohen*, 8 Cox, 41 (1858).

(o) *Hearne v. Garton*, 2 E. & E. 16 (1859), under 20 & 21 Vict. c. 43, s. 168.

So, where an Order of the Privy Council required under a penalty that every person having an animal affected by a contagious disease should with all practicable speed give notice thereof to a police constable, it was held that for the purpose of a conviction it must be proved that the defendant knew the animal to be diseased (*p*).

In *R. v. Hibbert* (*q*) the prisoner was indicted for unlawfully taking an unmarried girl under the age of sixteen, out of the possession of her father, against his will. The girl was going with another child to a Sunday school, when the prisoner met them, enticed them away to another town, and seduced the girl in question. He made no inquiry, and did not know who the girl was, or whether she had a father or mother living or not. Upon a case reserved, it was held that in the absence of any evidence that the prisoner knew or had reason for believing that the girl was under the lawful care or charge of her father, there could be no conviction.

One of the questions in the great case of *A.-G. v. Bradlaugh* (*r*) was whether the proceedings against a member of Parliament for the "offence" of sitting without swearing were civil or criminal. They were held not to constitute a *criminal cause or matter*, and Brett, M.R. (*s*), made the following observations :—

"What *offence* means in the statute is a voting or sitting without having taken or subscribed the oath. It is possible—I do not think it very probable—that at the beginning of a Parliament a member may sit or vote who, from forgetfulness or ignorance, has not taken the oath . . . without having any intention to do anything forbidden by law. I have no doubt that he would be liable to the penalty, for no question of intent is introduced into this Act of Parliament. Now to my mind, it is contrary to the whole established law of England (unless the legislation on the subject has clearly enacted it) to say that a person can be guilty of a crime in England without a wrongful intent—without an intent to do that which the law has forbidden. . . . Can anybody say that it is absolutely clear that this offence is to be considered as a crime? And, if it is not absolutely clear, then the doctrine comes in

(*p*) *Nicholls v. Hall*, L. R. 8 C. P. 322 (1873), under the Contagious Diseases (Animals) Act, 1869.

(*q*) L. R. 1 C. C. 184, under 24 & 25 Vict. c. 100, s. 55, following *R. v. Green*, 3 F. & F. 274; sed cf. *R. v. Prince*, *infra*.

(*r*) 14 Q. B. D. 667 (1884); cf. *Royse v. Birley*, L. R. 4 C. P. 296 (1869).

(*s*) At p. 689.

that an act done without an evil intent must not be considered a crime, and that therefore the forbidden act in this statute, made liable to a penalty, whether done with or without an evil intent, is not to be a criminal act."

In the comparatively few cases, to be considered in this chapter, where convictions have been upheld in spite of essential ignorance of fact and total absence of *mens rea*, or of such degree of culpability as would ordinarily suffice to constitute criminal liability on the defendant's part, the offences have been of such a character as to involve great public danger or inconvenience, and the main object of the criminal or quasi-criminal proceedings usually is to effect the summary abatement or prevention thereof; *i.e.*, to secure the stopping of the actual mischief complained of, rather than to inflict retributive punishment or to deter offenders in general (*i*).

Wherever the scope of any legislation is confined to criminal law in the true sense, the general rule is applicable, that there can be no crime without some form of criminal intentionality (*u*).

(2) *R. v. PRINCE* AND *R. v. TOLSON*.

Before considering the decisions dealing with quasi-crimes created by various statutes or arising under the common law, it will be well to examine in detail two cases of leading importance which afford by a clear contrast an illustration of the difficulties attending the application of the doctrine of *ignorantia facti* to certain classes of cases.

In *R. v. Prince* (*x*), a man was convicted of abduction, under the Offences Against the Person Act, 1861 (*y*), which renders guilty of misdemeanour "whosoever shall unlawfully take . . . any unmarried girl being under the age of sixteen years, out of the possession and against the will of her father, mother, or of any other person having the lawful care or charge of her." The jury found, on reasonable evidence, that before the prisoner took the girl away she told him that she was eighteen; that he *bona fide* believed that statement, and that such belief was reasonable. It was held by fifteen judges, only Lord Esher (then Brett, J.) dissenting, that these facts afforded no defence, and that the prisoner was properly convicted.

(*i*) Vide *Firth v. McPhail*, 1905, 2 K. B. 300, per Lord Alverstone, C.J. (*infra*).

(*u*) *Lanier v. The King*, 110 L. T. 326 (1913).

(*x*) L. R. 2 C. C. R. 154 (1875).

(*y*) 24 & 25 Vict. c. 100, s. 55.

Blackburn, J. (z), with whom nine other judges concurred, after referring to the precisely similar form of enactment used in other sections of the same Act (a), said :—

“ It seems impossible to suppose that the intention of the Legislature in those two sections could have been to make the crime depend upon the knowledge by the prisoner of the girl's actual age. It would produce the monstrous result that a man who had carnal connection with a girl in reality not quite ten years old, but whom he, on reasonable grounds, believed to be a little more than ten, was to escape altogether. He could not, in that view of the statute, be convicted of the felony, for he did not know her to be under ten. It seems to us that the intention of the Legislature was to punish those that had connection with young girls, though with their consent, unless the girl was in fact old enough to give a valid consent.

“ The man who has connection with a child, relying on her consent, does it at his peril, if she is below the statutable age.

“ The 55th section, on which the present case arises, uses precisely the same words.”

Bramwell, B. (b), with whom seven other judges concurred, said :—

“ Let us remember what is the case supposed by the statute . . . a *taking of a girl in the possession of someone, against his will*. I say that, done without lawful cause, is wrong, and that the Legislature meant it should be at the risk of the taker whether or no she was under sixteen. . . . This opinion gives full scope to the doctrine of the *mens rea*. If the taker believed he had the father's consent, though wrongly, he would have no *mens rea* ; so, if he did not know she was in anyone's possession or in the care or charge of anyone. In those cases he would not know he was doing the *act* forbidden by the statute—an act which, if he knew she was in possession and in care or charge of anyone, he would know was a crime or not, according as she was under sixteen or not.”

The learned Baron suggested other possible cases, in which similar considerations would arise and to which the same principle would apply :

“ A man was held liable for assaulting a police officer in the execution of his duty, though he did not know he was a police officer (c). Why ? Because the act was wrong in itself. So also in the case of burglary, could a person charged claim an acquittal on the ground that he be reved

(z) At pp. 171-2.

(a) Ss. 50 and 51.

(b) At pp. 174-6.

(c) Vide *Forbes v. Webb*, 10 Cox, 362 (1865); *Maxwell v. Clanchy*, 2 Cr. A. R. 26 (1909).

it was past six when he entered ? Or, in house-breaking, that he did not know the place broken into was a house ? ”

Denman, J., commented upon the meaning of the word “unlawful” :—

“If it means ‘with a knowledge or belief that every single thing mentioned in the section existed at the moment of the taking,’ undoubtedly the defendant would be entitled to an acquittal, because he did not believe that a girl of under sixteen was being taken by him at all. . . . It is equivalent to the words ‘without lawful excuse,’ using those words as equivalent to ‘without such an excuse as, being proved, would be a complete legal justification for the act, even where all the facts constituting the offence exist.’

“Cases may easily be suggested where such a defence might be made out, as, for instance, if it were proved that he had the authority of a court of competent jurisdiction, or of some legal warrant, or that he acted to prevent some illegal violence not justified by the relation of parent and child.”

It is, at first sight, a matter of difficulty to reconcile this decision with others of equal authority, and with the doctrine of *ignorantia facti* as commonly understood.

The solution of the problem seems to lie in the application of the principle that an act is not a crime unless the party recognised the fact as falling under the law, or might *with due attention* have done so. Due attention is that degree of attention which the law requires. Whenever a man seduces a girl who is in fact under sixteen, the law requires from him different degrees of attention to different matters. With regard to her parentage, he is not bound to investigate the facts at all : if he does not actually know that the girl has a father, mother or guardian, and has no special reason for thinking so, he may with impunity abduct her, being excused by the normal doctrine as to reasonable mistake (*d*). But as to her age, he is put upon the strictest obligation of thorough inquiry, an obligation best measured by the judicial phrase that he acts “at his peril.”

The real difficulty of *R. v. Prince* lies in the apparently arbitrary manner in which the statute was construed, and the decision in *R. v. Hibbert* distinguished. Why should the law require different degrees of diligence in respect of various circumstances, apparently of equal importance as regards the mischief of the crime prohibited ? What indication does the statute itself afford of any such differentiation ?

(*d*) *R. v. Hibbert, supra.*

However much or little ground there may be for it, there can be no doubt that the law, as settled by these two decisions, does discriminate between the circumstances of age and parentage, making knowledge or ignorance immaterial as to the former, but material as to the latter.

The only reason assigned, though not very clearly expressed in the judgments, is to the effect that a man seducing a girl without knowing her to be in anyone's care does not know himself to be committing even a civil wrong, whereas a man knowingly abducting a girl in ignorance of her being under the statutable age does consciously commit a tort, however optimistic he may be.

In default of any better reason, one is bound to accept this as the *ratio decidendi* in *R. v. Prince*, and to regard that case as establishing the proposition that a man can commit a crime without knowing it, provided he knows that he is infringing the legal rights of another person.

R. v. Tolson (e) was a case reserved by Stephen, J., upon the conviction of a woman, under the same Act (f), which renders guilty of felony "whoever, being married, shall marry any other person during the life of the former husband or wife," but with a proviso that "nothing in this Act shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years last past, and shall not have been known by such person (g) to be living within that time." The prisoner's husband having deserted her, on 13th December, 1881, she and her father made inquiries, and learned from his elder brother, and from general report, that he had been lost in a vessel which went down with all hands on board. On 10th January, 1887, supposing herself to be a widow, she openly went through the ceremony of marriage with another man, who was fully cognizant of the circumstances. In the following December the missing Tolson came home. The jury having found that, at the time of the second marriage, the prisoner, in good faith and on reasonable grounds, believed her husband to be dead, it was held (h) that such *bona fide* belief on reasonable grounds afforded a good defence.

(e) 23 Q. B. D. 168 (1888).

(f) 24 & 25 Vict. c. 100, s. 57.

(g) Vide *R. v. Cullen*, 9 C. & P. 681 (1840); *R. v. Curgerwen*, L. R. 1 C. C. R. 1 (1865), etc.

(h) By Lord Coleridge, C.J., Stephen, J., and seven other judges (five dissenting).

In the course of a long judgment, Wills, J., said :—

“ I am well aware that the mischiefs which may result from bigamous marriages, however innocently contracted, are great : but I cannot think that the appropriate way of preventing them is to expose to the danger of a cruel injustice persons whose only error may be that of acting upon the same evidence as has appeared perfectly satisfactory to a Court of Probate, a tribunal emphatically difficult to satisfy in such matters, and certain only to act upon what appears to be the most cogent evidence of death. . . .

“ It is said, however, in respect of the offence now under consideration, that the proviso in 24 & 25 Viet. c. 100, s. 57 . . . points out the sole excuse of which the Act allows. I cannot see what necessity there is for drawing any such inference. It seems to me that it merely specifies a particular case, and indicates what, in that case, shall be sufficient to exempt the party without any further enquiry from criminal liability.

“ The case of *R. v. Prince* is a direct and cogent authority for saying that the intention of the Legislature cannot be decided upon simple prohibitory words, without reference to other considerations. The considerations relied upon in that case are wanting in the present case, whilst, as it seems to me, those which point to the application of the principle underlying a vast area of criminal enactment, that there can be no crime without a tainted mind, preponderate greatly over any that point to its exclusion ” (i).

Stephen, J., after making some observations already quoted on the maxim concerning *mens rea* (k), said :—

“ All the judges in *R. v. Prince* agreed on the general principle, though they all, except Lord Esher, considered that the object of the Legislature being to prevent a scandalous and wicked invasion of parental rights (whether it was to be regarded as illegal apart from the statute or not) it was to be supposed that they intended that the wrong-doer should act at his peril. . . .

“ It appears to me that every argument which showed in the opinion of the judges in *R. v. Prince* that the Legislature meant seducers to act at their peril, shows that the Legislature did not mean to hamper what is not only intended, but naturally and reasonably supposed by the parties to be a valid and honourable marriage, with a liability to seven years’ penal servitude ” (l).

The decision in *R. v. Tolson* is easier to understand than that in

(i) Pp. 177—180.

(k) Vide Chap. I., *ante*.

(l) Pp. 189—191. ^

R. v. Prince. The prisoner was entitled to an acquittal, not on the bare ground of *ignorantia facti*, which is no excuse in itself, but because she had not fallen short of that degree of careful investigation and inquiry which the law required, to excuse what would otherwise have amounted to bigamy. With *due attention*, she failed to appreciate the fact as falling under the law.

Accordingly, this case has recently been distinguished, upon the conviction of a bigamist who said he thought his first marriage was invalid (*m*).

(3) QUASI-CRIMES.

The case of *R. v. Prince* indicates the extreme limit of the rigour of the law with regard to mistake of fact as affecting true crime. The doctrine to be deduced from it is that there may be *mens rea*, or sufficient culpable intentionality to make an act criminal, in spite of such mistake or ignorance of fact as leads the offender to suppose that he is committing, not a crime, but a tort.

There are, however, some classes of so-called crimes in respect of which it is quite unnecessary to consider the definition of *mens rea* or the relation thereto of ignorance or mistake, inasmuch as no culpable intentionality whatever is required to constitute criminal liability in respect of them.

Not only so, but apart altogether from the question of *mens rea*, the charge against the defendant may arise not out of any personal conduct on his part at all, but out of the conduct of some other person whom he has quite innocently and properly put in his place, or authorised to act on his behalf.

Quasi-crimes may therefore fail to be true crimes, not only for lack of intentionality, but also under the principle of volition, which requires every criminal act or omission to be directly or indirectly attributable to the wish or choice of the party (*n*).

Public nuisances form a curious class of quasi-crimes at common law.

For the purpose of supporting an indictment for nuisance, it is neither necessary to prove the existence of culpability nor to show any personal act or default on the part of the defendants. The sole duty of the

(*m*) *R. v. Bayley*, 1 Cr. A. R. 86 (1908); cf. *Lolley's Case* (1812), *post*, Chap. III.

(*n*) Vide Chap. I., *ante*; Chap. X., *post*.

prosecution is to establish satisfactorily the existence of the mischief complained of, without regard to the manner in which such mischief arose; because an indictment for nuisance is criminal in form only, and not in substance. It is essentially remedial, and not punitive (o).

Statutes for the prevention of the sale of adulterated foods and other articles of commerce have always afforded a large crop of difficulties as to the application or non-application of the doctrine of *ignorantia facti*.

In *Fitzpatrick v. Kelly* (p) the defendant was charged, under the Adulteration of Food Act then in force, with selling as unadulterated some butter which had been largely adulterated with lard and other substances. There was no evidence of *scienter*, but Blackburn and Archibald, JJ., held this to be immaterial, and decided that an offence was committed whenever an adulterated article was sold as unadulterated, "whether the seller knew it or not" (g).

In *Betts v. Armstead* (r) the respondent, who had sold some bread containing alum, although in ignorance thereof, was held rightly convicted under sect. 6 of the Sale of Food and Drugs Act, 1875 (s), which provides that "no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance and quality demanded by such purchaser" :—

"It was suggested that the justices ought to read into the section the word *knowingly*. . . . It is clear from the words of other sections of the Act that the word *knowingly* was intentionally omitted from sect. 6. It is provided by sect. 5 that want of knowledge shall be a defence in the case of the offences specified in sects. 3 and 4, and it is therefore obvious that the Legislature, when it desired to make ignorance a good answer, has expressed that intention in the clearest terms" (t).

In the same case, A. L. Smith, J., said :—

"Under sects. 3 and 4 it is a defence to prove want of knowledge, and the penalty for a first offence is £50; while a second offence is made a

(o) *R. v. Medley, R. v. Stephens, post*, Chap. X.

(p) L. R. 8 Q. B. 337 (1873), under 35 & 36 Vict. c. 74, s. 2.

(g) At p. 343: cf. *Rook v. Hopley*, 3 Ex. D. 209 (1878), and *Harris v. May*, 12 Q. B. D. 97 (1883).

(r) 20 Q. B. D. 771 (1888).

(s) 38 & 39 Vict. c. 63.

(t) Per Cave, J.

misdemeanour, punishable with six months' hard labour. For offences under sect. 6, however, the only punishment is a penalty of £20. That also goes to show that sect. 6 intentionally says nothing about want of knowledge."

Pain v. Boughtwood (u) arose under the latter part of sect. 9 of the same Act: "No person shall, with intent that the same may be sold in its altered state without notice, abstract from any article of food any part of it so as to affect injuriously its quality, substance or nature, and no person shall sell any article so altered without making disclosure of the alteration," under a penalty, in each case, not exceeding £20. The considerations guiding the judges in *Betts v. Armstead*, as to sect. 6, being held applicable also to sect. 9, it was held that a person selling an altered article could properly be convicted, although he did not know of the alteration:—

"By sect. 25, the seller is given a power of protecting and exonerating himself, by obtaining a written warranty from the person who has supplied the article to him. If that course is not taken, the Legislature assumes that the seller has been a party to what has been done. Every precaution is taken in the statute to enable a person honestly selling the article without knowledge of the alteration to defend himself against a charge under sect. 9" (x).

This decision affords a good illustration of the doctrine that the law requires different degrees of attention and inquiry in different cases. Here, the law requires of a seller a greater degree of caution than that signified by the word *reasonable*, with reference to mistake of fact. He is not required merely to make such inquiries as are reasonable: indeed, the normal rule as to a reasonable mistake of fact is altogether departed from, a particular course of inquiry being marked out by the statute itself. When the statutory precaution of obtaining a written warranty is duly resorted to, it avails as an absolute protection against criminal liability; when it is neglected, *ignorantia facti* cannot be pleaded, because the offender has obviously failed in giving to the matter that degree of attention which the law requires (y).

In *Dyke v. Gower* (z), under the same section, *Pain v. Boughtwood*

(u) 24 Q. B. D. 353 (1890).

(x) Per Grantham, J.

(y) See *vide* Fost., Appendix, pp. 439—441.

(z) 1892, 1 Q. B. 220; cf. *Smithies v. Bridge*, 1902, 2 K. B. 13.

was followed, and applied to a rather extreme case. The facts are sufficiently stated in the judgment of Lord Coleridge, C.J. :—

“ A milk-seller had milk sent up to her from the country in comparatively large quantities ; she poured it into a pail, and sold it in small quantities to her customers, for that purpose dipping it from time to time out of the pail with a measure. It is matter of common knowledge that, unless milk is frequently stirred, there is a tendency on the part of the cream or fatty matter of the milk to rise to the top, leaving the lower portion of the milk denuded of the fat which it originally contained. The milk-seller sold the milk in that condition. . . . I will assume that she did not gain by it, that is to say, that she sold the upper portion of the milk, which contained an excess of fat, at the same price as that at which she afterwards sold the lower portion, which was deficient in fat. But this Act was passed with the object, not of punishing the seller, but of protecting the buyer. . . . There had been, unconsciously perhaps, abstracted from the milk its fatty matter, to an extent which injuriously affected its quality. . . . The earlier branch of the section prohibits a person from abstracting part of an article of food *with intent that the same may be sold in its altered state without notice*, and it is said that the offence of selling aimed at by the latter part of the section is limited to the sale of an article *so altered*, that is to say, altered with such intent. . . . To my mind, so to construe the section would be to make nonsense of it, and to deprive the public of the greater part of the protection which the section was intended to afford . . . the injury to the purchaser being just the same, whether there was a wrongful intent or not.”

Wright, J., referred to *Fitzpatrick v. Kelly*, and said :—

“ Knowing of that decision, Parliament in 1875 drafted the present Act in the form in which they did, and it is only reasonable to suppose that from their knowledge of the construction which the judges had put upon the section in the earlier Act, they could tell what construction the judges would be likely to put upon a similar section in the Act they were passing, and would know that it would be construed without any reference to guilty intent.”

The doctrine of *Dyke v. Gower* was expressly approved in the judgment of Lord Russell, C.J., in the similar case of *Spiers and Pond v. Bennett (a)*, in which, however, it was held that there had been a sufficient disclosure of the alteration to satisfy the requirements of the section.

In *Derbyshire v. Howlston (b)* a different construction was put upon the third paragraph (now repealed) of sect. 27 of the same Act. It

(a) 1896, 2 Q. B. 65.

(b) 1897, 1 Q. B. 772.

was held that the appellant could not be convicted thereunder of giving a false warranty in writing to a purchaser, seeing that he had no reason, at the time he sold the article, to believe that it was otherwise than as stated. This construction has since been expressly confirmed by the Sale of Food and Drugs Act, 1899 (c), but the judgment of Hawkins, J. is noteworthy, if only because it seems to make of no account, as bearing on sect. 27, the considerations which were relied upon in previous cases upon the construction of sects. 6 and 9, particularly the points as to lightness of penalty and omission of the word *knowingly* :—

“ It seems to me a monstrous proposition that a man can be convicted and liable to a penalty of £20 in such a case as this, even though he believed that the warranty which he gave was true. . . . Where it is thought to be shown that the Legislature means to punish without requiring proof of moral guilt, such an intention must be very clearly expressed. In the present case, where the charge is under one of four clauses contained in the same section, and all the other three clauses clearly require proof of guilty knowledge, I am of opinion that the conviction cannot be supported in the absence of such proof.”

By sect. 116 of the Public Health Act, 1875 (d), power is given to certain public officials to inspect meat “ exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale and intended for the food of man,” and if such meat appears to be unsound or unfit for food, it may be seized. By sect. 117 a justice may condemn the meat and order it to be destroyed, “ and the person to whom the same belongs, or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found ” is liable to a penalty (e).

This statute is obviously intended to put people on their peril as to either the exposure for sale or the mere possession, apart from such exposure (f), of any meat that is found in fact to be unsound or unfit for human consumption. In other words, it gives rise to a liability which, although in many cases it may be criminal, is in some cases merely quasi-criminal.

In *Blaker v. Tillstone* (g) there was no evidence that the appellant

(c) 62 & 63 Vict. c. 51, s. 20 (6).

(d) 38 & 39 Vict. c. 55.

(e) Cf. Public Health Acts Amendment Act, 1899, s. 17 (2).

(f) *Mallinson v. Carr*, 1891, 1 Q. B. 48.

(g) 1894, 1 Q. B. 345.

had seen the meat, although his servants knew of its condition, and the appellant might and would have had personal knowledge if he had exercised reasonable care. Upon a case stated by the justices, it was held that proof of personal knowledge was not necessary for a conviction :—

“The object of the Act is that people shall not be exposed to the danger of eating and drinking poison ; that anything which is likely to injure life shall not be sold. . . . We are dealing with a statute passed for the protection of the public, the purpose of which would be defeated if it were necessary to show a guilty knowledge in the seller ” (*h*).

The statutory provisions above quoted were afterwards extended to all articles intended for the food of man (*i*), and it was provided that a justice might condemn any such article upon complaint made “although the same has not been seized as mentioned in section 116 of the said Act ” (*k*).

Under this enactment it was held in *Firth v. McPhail* (*l*) that there could be no conviction where the defendant deposited diseased meat on another person’s premises for the purpose of sale, it not having been actually “exposed for sale, or found in his possession or on his premises,” and Lord Alverstone, C.J., though expressly approving the decision in *Blaker v. Tillstone*, observed :—

“It is true that the statutes in question ought, if possible, to be so construed as to make them effective to prevent diseased meat and other kinds of food being sold to persons who may not themselves be able to detect whether the meat or food is good or not. It must be remembered, however, that that particular evil is met to some extent by the power given to seize the meat, and that the additional punishment of the persons who have done, or have been parties to, that which has been done, though it may be desirable in order to prevent the thing being done again, does not afford any direct protection to the public in respect of the meat which has been seized. . . . Reverting to the words ‘and the person to whom the same belongs or did belong at the time of the exposure for sale,’ it may be that the Legislature thought that the seizure and forfeiture of the meat was a sufficient protection unless there had been an exposure for sale.”

(*h*) Per Lord Coleridge, C.J. ; et vide *Wieland v. Butler-Hogan*, 1905, 2 K. B. 300 ; *Hobbs v. Winchester Corporation*, 1910, 2 K. B. 471.

(*i*) Public Health Act Amendment Act, 1890, s. 28 (1).

(*k*) *Ib.*, s. 28 (2).

(*l*) 1905, 2 K. B. 300.

The phenomenon of quasi-crime has frequently arisen under various sections of the Licensing Acts, whereby the sale of intoxicating liquors without a licence, or to drunken persons, or to police officers on duty and the carrying on of betting or gaming on licensed premises, have been prohibited in a more or less arbitrary manner.

As early as 1842 it was established that persons coming under the Licensing Acts then in force were bound by rules more rigorous than those governing the construction of ordinary penal enactments.

In *R. v. Lockwood* (m) it was held that the keeper of a licensed beer-shop (n) was liable to penalties imposed (o) for having in his possession certain prohibited articles; and that it was unnecessary to prove that he had them in his possession with any criminal intent.

So, in *R. v. Woodrow* (p) a dealer in tobacco by retail was held liable to a statutory penalty of £200 (q) for having in his possession some adulterated tobacco, although he had purchased it as genuine, and had no knowledge or cause to suspect that it was not so; and Pollock, C.B., said:—

“It being within the personal knowledge of the party that he was in possession of the tobacco (indeed, a man can hardly be said to be in possession of anything without knowing it) (r), it is not necessary that he should know that the tobacco was adulterated; for reasons probably very sound, and not applicable to this case only, persons who deal in an article are made responsible for its being of a certain quality. . . . In reality, a prudent man who conducts this business will take care to guard against the injury he complains of. . . . If he examines the article, he may reject it, and not keep it in his possession; or if he is incompetent to do that, he may take a guarantee that shall render the person with whom he is dealing responsible for all the consequences of a prosecution” (s).

In the same case, Parke, B., said:—

“An innocent man may suffer from his want of care in not examining

(m) 9 M. & W. 378 (1842).

(n) Under 1 Will. 4, c. 64, and 4 & 5 Will. 4, c. 84.

(o) By 56 Geo. 3, c. 58, s. 2.

(p) 15 M. & W. 404 (1846).

(q) Under 5 & 6 Vict. c. 93, s. 3; et vide s. 98.

(r) Cf. *R. v. Marsh*, 2 B. & C. 717 (under 5 Anne, c. 14, now repealed; vide Game Act, 1831, s. 4), per Abbott, C.J., and Littledale, J. (1824); *Smith v. Webb*, 60 J. P. 517 (under Weights and Measures Act, 1878, 41 & 42 Vict. c. 49, s. 48) (1896); and *R. v. Crane*, 7 Cr. A. R. 113 (1912).

(s) Per Pollock, C.B., at pp. 415-6.

the tobacco he has received, and not taking a warranty ; but the public inconvenience would be much greater if in every case the officers were obliged to prove knowledge. They would be very seldom able to do so. The Legislature have made a stringent provision for the purpose of protecting the Revenue, and have used very plain words " (t)."

With regard to the sale of liquors to intoxicated persons, the law was, until recently, contained in sect. 13 of the Licensing Act, 1872 (u).

In *Cundy v. Le Cocq* (x), where a publican had sold liquor to a drunken person, who had given no indication of being intoxicated, in ignorance of the fact that he was drunk, it was held that the statutory prohibition was absolute, and that knowledge was not necessary to constitute the offence, or so-called offence.

This case was distinguished in *Somerset v. Wade* (y), decided under the same section, as to the offence of " permitting drunkenness." A man cannot properly be said to permit anything, unless he have some knowledge, or means of knowledge, of what he is permitting, as well as control, or means of control, over the conduct in question (z).

The section under which these cases were decided is now repealed by, and re-enacted in sect. 75 of, the Licensing (Consolidation) Act, 1910, which, after making it an offence punishable by fine for a licence-holder to " permit drunkenness, or any violent, quarrelsome or riotous conduct to take place on his premises, or sell any intoxicating liquor to a drunken person," contains a new provision (a), that upon a charge against a licence-holder of permitting drunkenness on his premises, if it is proved that any person was drunk on his premises, it shall lie on him to prove that he and the persons employed by him took all reasonable steps for preventing drunkenness on the premises.

This express provision affects the onus of proof as to the guilty knowledge which was held to be essential in *Somerset v. Wade*, and leaves untouched the rule in *Cundy v. Le Cocq*, to the effect that *mens rea* is not necessary to constitute the offence (or quasi-crime) of selling liquor to a drunken person (b).

(t) Per Parke, B., at p. 417.

(u) 35 & 36 Vict. c. 94.

(x) 13 Q. B. D. 207 (1884).

(y) 1894, 1 Q. B. 574.

(z) *R. v. Chainey*, 83 L. J. K. B. 306 (1913), under sect. 17 of the Children Act, 1908.

(a) Sub-sect. 3.

(b) Cf. *Copley v. Burton*, 39 L. J. M. C. 141 (1870), as to sale to supposed traveller during closing hours ; see now sect. 61 (2) of the Consolidation Act.

Sect. 16 of the Act of 1872 (c) was considered in the important case of *Sherras v. De Rutzen* (d), where a police constable on duty had been supplied with liquor by the appellant's daughter in his presence. The constable, who was well known to them both, had removed his armlet, and they therefore took it for granted that he was off duty. Upon a case stated by the quarter sessions the conviction was quashed, on the ground that the appellant had reasonably believed the officer to be off duty :—

“ An argument has been based on the appearance of the word *knowingly* in sub-sect. 1 of sect. 16, and its omission in sub-sect. 2. In my opinion, the only effect of this is to shift the burden of proof. In cases under sub-sect. 1, it is for the prosecution to prove knowledge, while in cases under sub-sect. 2, the defendant has to prove that he did not know ” (e).

Another section of the Act of 1872 creating quasi-crimes was sect. 17, now re-enacted in practically the same form in sect. 79 of the Consolidation Act, rendering it an offence punishable by fine for a licence-holder to suffer any gaming or unlawful game to be carried on upon his premises. Here, however, there is no departure from the doctrine of *mens rea* (f) which requires some degree of knowledge or wilful ignorance (e.g., connivance or carelessness) on the part of the defendant or someone put in his place to supervise the conduct of business on the licensed premises. The cases of quasi-crime under this section affect, not the principle of intentionality, but the principle of volition ; they amount merely to a departure from the ordinary doctrine that a man is not criminally responsible for unlawful conduct on the part of his servant or agent committed without his own privity or cognizance (g).

Brooks v. Mason (h) arose under sect. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901 (i), inflicting a penalty upon any licence-holder who knowingly sells or delivers, or allows any person to sell or

(c) Now re-enacted in almost identical words in sect. 78 of the Consolidation Act.

(d) 1895, 1 Q. B. 918 ; sed cf. *R. v. Guest*, 60 J. P. 458 (1896).

(e) Per Day, J. ; cf. per Brett, J., in *R. v. Prince*, L. R. 2 C. C. R. 154, at pp. 159—162 ; per Stephen, J., in *Cundy v. Le Cocq*, *ub. sup.*

(f) *Lee v. Taylor and Gill*, 77 J. P. 66 (1912).

(g) Vide *Bosley v. Davies*, *Redgate v. Haynes*, *Somerset v. Hart*, and *Bond v. Evans*, *post*, Chap. X.

(h) 1902, 2 K. B. 743.

(i) See now Licensing (Consolidation) Act, 1910, s. 68.

deliver, intoxicating liquor to any person under the age of fourteen for consumption off the premises, "excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels." Lord Alverstone, C.J. (Wills and Channell, JJ., concurring), held, "though not without doubt, that it would be altering the language of the statute, and departing from its intention, to read the word *knowingly* into the exception," and that "the Act only intended to except intoxicating liquors sold or delivered in vessels which were in fact properly sealed and secured. The exception specifies matters of defence which, if proved in fact, would negative the allegation that an offence had been committed."

It was therefore held to be no defence that the licence-holder honestly believed, when he delivered the liquor, that the vessel was sealed, when in point of fact it was not (*k*).

Yet it was held in *Groom v. Grimes* (*l*), under the same section, that the statute could not be construed as enacting an absolute prohibition so as to support the conviction of a licence-holder where neither he nor the barman who sold the liquor had any knowledge that the buyer was under fourteen years of age, the barman honestly believing him to be over that age.

The distinction between the two cases seems to be that the seller is put upon his peril to ascertain a specified fact, viz., that the vessel is corked and sealed: which he may ensure by corking and sealing it himself; but that as to the buyer's age, which must necessarily be a matter of some uncertainty so far as the seller is concerned (*m*), the ordinary rule of law applies, whereby *bona fide* mistake on reasonable grounds affords a good defence.

There remain to be mentioned a few miscellaneous and isolated cases which, decided upon the construction of various statutes, are not included in any of the foregoing classes of exceptions to the general principle of intentionality.

In *Sherras v. De Rutzen* (*n*) Wright, J., mentioned, as an exceptional class of cases in which the ordinary doctrine has been departed from,

(*k*) Cf. *Farndale v. Dillon*, 1907, 2 K. B. 513; *Jones v. Shervington*, 1908, 2 K. B. 539; and *Emery v. Nolloth*, etc., *post*, Chap. X.

(*l*) 89 L. T. 129; 67 J. P. 345 (1903).

(*m*) See cf. *R. v. Prince*, *supra*.

(*n*) *Supra*.

"cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right," *e.g.*, unintentional trespass in pursuit of game (*o*), and unconscious dramatic piracy (*p*).

Such cases are of rare occurrence, and the procedure is obviously analogous to that of indictment at common law for a public nuisance.

In *R. v. Bishop* (*q*) the defendant was indicted for receiving more than two lunatics into an unlicensed house (*r*). It was proved that she honestly, and on reasonable grounds, believed that the persons in question were not lunatics, but were persons afflicted with hysterical and other disorders approaching to lunacy. The decision of Stephen, J., that such belief was immaterial, regard being had to the scope of the Act and the object for which it was passed, was upheld by the Court on appeal, Denman, J., observing that if the defendant's honest belief were held to be a defence, the object of the statute might be frustrated. In commenting upon the case, Stephen, J., observed that the stringent construction put upon the Act was warranted by its general scope and the nature of the evils to be avoided: "I am not aware of any other way in which it is possible to determine whether the word *knowingly* is or is not to be implied in the definition of a crime in which it is not expressed" (*s*).

By sect. 1 of the Betting and Loans (Infants) Act, 1892, it is made a misdemeanour to send or cause to be sent certain betting circulars, etc., to a person whom the sender knows to be an infant; and if such circular "names or refers to anyone as a person to whom any payment may be made, or from whom information may be obtained . . . the person so referred to shall be deemed to have sent such document as aforesaid, unless he proves that he had not consented to be so named, and that he was not in any way a party to, and was wholly ignorant of, the sending of such document" (*t*).

By sect. 3 it is provided that if any such circular, etc., is sent to any

(*o*) *Morden v. Porter*, 7 C. B. N. S. 641, per Williams and Willes, JJ. (1860); cf. *Watkins v. Major*, L. R. 10 C. P. 662 (1875); *Dickinson v. Ead*, 30 T. L. R. 496 (1914); et vide art. "Game Trespass, Absence of Mens Rea," 78 J. P. N. 313.

(*p*) *Lee v. Simpson*, 3 C. B. 871; cf. *Cooper v. Whittingham*, 15 Ch. D. 501 (1880).

(*q*) 5 Q. B. D. 259 (1879).

(*r*) Contrary to 8 & 9 Vict. c. 100; now Lunacy Act, 1890, s. 315.

(*s*) St. Hist., v. 2, p. 117.

(*t*) Cf. sect. 2, and the Moneylenders Act, 1900, s. 5.

person at any university, school, etc., and such person is an infant, the person sending or causing the same to be sent shall be deemed to have known that such person was an infant, unless he proves that he had reasonable ground for believing such person to be of full age.

In *Milton v. Studd* (u) it was held, under these sections, that a circular sent to a person at an address in a university town is not sent to a person "at a university," unless the sender knows that the address is that of a house at which undergraduates are permitted by the university authorities to reside :—

"In my opinion, the section should be read thus : 'If any such circular is sent to any person at an address in a university town which would suggest that the sender knew that the person to whom it was sent is a member of the university, and such person is an infant, the person sending the same shall be deemed to have known that such person was an infant' " (x).

The intention of the statute was undoubtedly to create as wide a presumption as possible of knowledge, on the sender's part, as to the material facts ; and there is perhaps traceable in the above decision a tendency to confine within narrow limits the application of the doctrine relied upon in some of the older decisions whereby the general scope and purpose of an Act are evoked for the creation of quasi-crime by implication.

On the other hand, it has been rather widely suggested (y) that the doctrine of *mens rea* has no application to by-laws regulating the width of thoroughfares, the height of buildings, and other matters of municipal legislation, for the general welfare, health, or convenience ; and it has indeed been laid down in a recent case that from the operation of the general doctrine are to be excluded all cases of the breach of those statutory regulations which are now becoming so manifold and voluminous as to increase to an alarming extent the burden of legal responsibility (z).

(u) 1910, 2 K. B. 118.

(x) Per Bray, J.

(y) Wills, Circ. Ev., pp. 148-9

(z) Per Lord Alverstone, C.J., *Provincial Motor Cab Co. v. Dunning*, 1909, 2 K. B. 599, vide *post*, Chap. X.

CHAPTER III.

IGNORANCE OF LAW.

“ *Regula est, juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere* ” (a).

“ *Ignorantia juris, quod quisque scire tenetur, . . . neminem excusat* ” (b).

In the leading case (c) a jury had convicted the prisoner of keeping a lottery but recommended him to mercy on the ground that he was perhaps ignorant of the statute, and did not know that he was acting contrary to law. The conviction was affirmed, Erle, C.J., saying: “ Ignorance of the statute is no excuse for the violation of its provisions. That ground does not annul the verdict.”

Two reasons have been assigned for this doctrine, one of which is absurd, and the other indisputable.

The false reason is that invented by the jurist Neratius (d): “ *Cum ius finitum et possit esse et debeat, facti interpretatio plerumque etiam prudentissimos fallat* ”; and adopted by Blackstone (e): “ A mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence.”

Any person who could really claim complete acquaintance with even statute law alone, say from the first clause of Magna Carta to the last paragraph of the most recent regulations issued under the National Insurance Act, 1911, would have gained more wisdom than that promised by the serpent to our first ancestors, when the law was in a state of less complexity: “ Ye shall be as gods, knowing good and evil.”

The only true, and at the same time obviously sufficient, reason for the doctrine of *ignorantia juris* is that, if this were once admitted as a ground of immunity, the questions arising out of it would in the majority of cases be incapable of solution, and would render impossible the

(a) Dig., 22, 6, 9.

(b) 2 Rep. 3, 6; 1 Hale, 42.

(c) *R. v. Crawshaw*, 30 L. J. M. C. 58 (1860).

(d) Dig., 22, 6, 2.

(e) BL Comm., II, 47.

administration of justice. Finding it impracticable to enter into such questions, the law must needs avail itself of a sweeping rule, or presumption, prohibiting the allegation of ignorance by way of excuse.

In other words, "The law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it" (*f*).

There are, however, modern apologists for the reasoning put forward by Neratius and Blackstone.

"This substantive principle is sometimes put in the form of a rule of evidence, that everyone is presumed to know the law. It has accordingly been defended by Austin and others on the ground of difficulty of proof. If justice requires the fact to be ascertained, the difficulty of doing so is no ground for refusing to try. But everyone must feel that ignorance of the law could never be admitted as an excuse, even if the fact could be proved by sight and hearing in every case. Furthermore, now that parties can testify, it may be doubted whether a man's knowledge of the law is any harder to investigate than many questions which are gone into (*g*). The difficulty, such as it is, would be met by throwing the burden of proving ignorance on the law-breaker. The principle cannot be explained by saying that we are not only commanded to abstain from certain acts, but also to find out that we are so commanded. For, if there were such a second command, it is very clear that the guilt of failing to obey it would bear no proportion to that of disobeying the principal command if known. Yet the failure to know would receive the same punishment as the failure to obey the principal law.

"The true explanation of the rule is the same as that which accounts for the law's indifference to a man's particular temperament, faculties, and so forth. Public policy sacrifices the individual to the general good" (*h*).

It is a pity that so much pains should be taken to arrive at this platitude; and the more so because almost every argument used is faulty.

The proposition that if justice (*i.e.*, some ideal principle of fairness) requires proof, difficulty is no ground for dispensing with it, is notoriously at variance with the principles governing the administration of law in any civilised community. If it were true, the entire law of evidence would have to be re-written, proof of motive might well be regarded

(*f*) Per Tindal, C.J., 10 Cl. & F. 210.

(*g*) Cf. Markby, 269.

(*h*) Holmes, pp. 47-8.

as material to the issue in every trial, and judicial cases would be of boundless range and infinite duration.

Every legal presumption followed by the Courts is grounded upon the difficulty or inconvenience of bringing the actual facts into direct proof; and it is a fallacy to set up any other reason as justifying the presumption of legal knowledge.

In the case of a newly arrived foreigner committing *malum prohibitum*, the fact of actual ignorance of the law could certainly be proved with reasonable satisfaction "by sight and hearing," and there is no principle of "justice" which would refuse such evidence in justification were it not for the *presumptio juris et de jure*, grounded upon the general inconvenience which would ensue from the admission of such evidence in any circumstances.

In an isolated case of that kind there might be no actual difficulty in considering evidence of ignorance, but, as Lord Ellenborough once said (i), if such evidence were once admitted, "there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case."

It is true that, "now that parties can testify," any criminal might go into the box and swear to his own ignorance. That would no doubt frequently happen; but what value could be attached to such testimony? How can it be thought that such a farce would suffice to show the prisoner's state of mind with regard to the law?

Of all matters, the state of any man's mind is the most difficult to probe. Concerning facts, his knowledge or ignorance may sometimes be gathered from his behaviour; but how could a prisoner's worthless testimony as to his own ignorance of positive law be either corroborated or disproved?

Every prisoner would go scot free, unless shown to have made an explicit confession (after caution) to the effect that he was thoroughly familiar with all the details of the statute and case law bearing upon the offence charged against him.

The difficulties involved by such procedure as this could certainly not be disposed of by "throwing the burden of proving ignorance on the law-breaker." Even if the fact of ignorance were proved, such ignorance might be due to the prisoner's own neglect to avail himself

(i) In *Bilbie v. Lumley*, 2 East, 469.

of the means of education at his disposal. An inquiry into such questions would involve, among other things, an exhaustive review of the prisoner's whole career, from weaning to felony.

The doctrine is not explained, certainly, "by saying that we are not only commanded to abstain from certain acts, but also, to find out that we are commanded." So far from being a complete explanation of the reason, this is merely a partial statement of the effect of the principle under discussion. There undoubtedly is a "second command" of that kind, binding as many persons as come within the effective promulgation of the law. Others it cannot bind, by way of command; they are punished, not for actual crime, but arbitrarily, by virtue of legal presumption, justified by the difficulty of drawing those distinctions which an ideal system of justice would require. The moral guilt of not ascertaining the existence of a law may be *nil*; but the legal guilt of that dereliction bears the same relation to consequent infractions of the law as the legal guilt of becoming intoxicated bears to offences committed by a drunken man.

The remarkable thing is, not that the law sacrifices the individual to the public good (as it always does), but that, in punishing those who were ignorant of its commands, it inflicts evil upon persons who were not under its sanction at the time when they committed the acts forbidden, and upon whose motives at that time the law could therefore have no operation or influence.

An ideal system of law, armed with the useful weapon of omniscience, would not do this. Positive law, being less powerful, deals the heavier strokes, and discriminates less where they fall.

Our law does not, as the Roman law is said to have done (*k*), allow the existence of any classes of persons *quibus permissum est jus ignorari*. All persons capable of responsible conduct are conclusively presumed to be acquainted as well with the provisions of the most recent statute (*l*) as with the most antiquated precepts of the common law.

Thus, it was held to be no defence, on the part of a foreigner charged with an unnatural crime committed in England, that he did not know he was doing wrong, the act not being an offence in his own country (*m*).

(*k*) Dig., 22, 6, 93; cf. Lindley, s. 29, Chap. 3, *sed vide* Clark, Anal., p. 56.

(*l*) Cf. Lindley, s. 25, Chap. 3; *Burns v. Newell*, *post*, Chap. X.

(*m*) *R. v. Esop*, 7 C. & P. 456 (1836).

It does not matter how little opportunity there may have been to acquire a knowledge of the law : the maxim applies even in hard cases.

Foreigners acting as seconds in a "fair duel," in ignorance of the law, and under the impression that they were bound as men of honour to act as they did, were held triable on the capital charge in spite of the fact that the acting as seconds in a duel was not a punishable offence according to the law of their own country (*n*).

The same doctrine would of course apply, by virtue of the fiction of extritoriality (*o*), to an offence committed on board a British ship while on the high seas.

It might be imagined that, in the case of a statute recently passed, ignorance might be allowed as an excuse, on proof that it was impossible for news of the statute to reach the prisoner's ears before the time when the offence was committed. It was, however, held otherwise by Lord Eldon in a case of malicious shooting, under two statutes (*p*) the latter of which, "amending certain defects in the law respecting offences committed on the high seas," only received the Royal Assent on the 10th May, 1799. The offence was committed upon a ship off the coast of Africa on the 27th June, 1799, when the prisoner could not possibly know of the existence of the Act. The jury having been directed that "his ignorance of the fact could in no other wise affect the case than that it might be the means of recommending him to a merciful consideration elsewhere," he was convicted accordingly, and the conviction was upheld, though a pardon was recommended by the judges (*q*).

It may therefore be laid down that, so far as criminal law is concerned, the presumption of legal knowledge is not only conclusive wherever it applies, but is quite free from exceptions in point of its application, so far as it is confined to questions of pure law.

The only real difficulty is to distinguish between ignorance of law and ignorance of fact.

The difficulty of discriminating between questions of law and those of

(*n*) *Baronet's Case*, 1 E. & B. 1 (1852).

(*o*) *R. v. Lopez*, *R. v. Satler*, D. & B. 525 (1858).

(*p*) 9 Geo. 1, c. 22 ; 39 Geo. 3, c. 37.

(*q*) *R. v. Bailey*, R. & R. 1 (1799) ; cf. *Burns v. Nowell*, *ub. sup.*

fact is as old as, and even older than, the system of trial by judge and jury, being indeed inevitably attendant upon the application to particular facts and circumstances of any system of law whatever (r).

Where a mistaken claim of right is alleged, questions of law are frequently confused with questions of fact, and it is possible to look at one and the same question from either point of view as involving a question of law or of fact.

For example, *Lolley's Case* (s), where a man was held rightly convicted of bigamy (t), having married after an invalid Scotch divorce obtained in good faith, and the validity whereof he had no reason to doubt (u), was cited by Wright, J. (x), as an instance of mistake of fact, and as involving a departure from the normal doctrine of *mens rea*; but it can with at least equal reason be regarded (y) merely as an ordinary application of the rule concerning mistake of law. The same remark applies to another example suggested by the same authority (z), viz., a claim of right unsuccessfully set up on the ground of a *bona fide* belief in a legally impossible right to fish (a).

These are, however, exceptional cases, and it may be laid down as a rule of general application that when a person, charged with a criminal offence, succeeds in proving satisfactorily that the conduct complained of was induced by a reasonable and *bona fide* mistake on his part as to the existence of a legally possible (but in fact non-existent) right to do the acts charged, that defence may be effective under the doctrine of *ignorantia facti*, although *ignorantia juris* be also involved.

As was said by Lord Westbury in a civil case :—

“*Ignorantia juris haud excusat*, but in that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact : it may be the result also of matter of law” (b).

(r) Cf. Dig., 22, 6, 1.

(s) R. & R. 237 (1812).

(t) Under 1 Jac. I, c. 11.

(u) Cf. R. v. Bayley (1908), ante, Chap. II.

(x) In *Sherras v. De Rutzen*, ante, Chap. II.

(y) Ken., S. C., p. 34, n. 2.

(z) Wright, J., *ib. sup.*

(a) *Hargreaves v. Diddams*, L. R. 10 Q. B. 582 (1875); cf. *R. v. Twose*, *infra*; *R. v. Hearn*, cit. Kenny, Outl., 69.

(b) *Cooper v. Phibbs*, L. R. 2 H. L. 170.

The maxim *In jure non remota causa sed proxima spectatur* is frequently applicable in such cases.

"It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree" (c).

It is on this ground that a *bona fide* and reasonable claim of right justifies what would otherwise amount to larceny (d). The proximate error is as to a supposed fact, viz., that the thing taken belongs to the taker, and not to another.

Thus, if a woman were to take corn by gleaning it from a field in the *bona fide* though mistaken belief that she had a right to do so, the jury might properly acquit on the ground that there was no felonious intention (e); it being obviously impracticable in such a case to decide how far the mistake related strictly to matters of fact (e.g., the tacit consent of the farmer; existence of a local custom, etc.) and how far to questions of abstract law (e.g., the sufficiency or legal admissibility of the alleged custom).

A woman was indicted for stealing a five-pound note, which was found by her little girl in the street and handed to another little girl, from whom the prisoner recovered it, saying: "Where is that note which our Mary picked up?" Upon its being given to her, she delivered it to her husband, who at once cashed it. When inquiry was made, the prisoner foolishly denied all knowledge of the matter. Upon these facts, Coleridge, J., directed the jury as follows:—

"Elizabeth Reed might think that she had a right to the note, in consequence of her daughter having picked it up. . . . And, thinking so, she might have gone and made the demand for it, as if she had said, 'You have Mary's note; give it up.' Under these circumstances, she could not be guilty of larceny. But then the conduct of the parties subsequently to this is to be considered. . . . Ignorance of the law cannot excuse any person, but at the same time, when the question is with what intent a person takes, we cannot help looking into their state of mind; as if a person takes what he believes to be his own, it is impossible to say he is guilty of felony" (f).

(c) Bac. Max., Reg. 1.

(d) Vide Kenny, Outl., pp. 68-9, and 203-5.

(e) Russ., 1190; cf. *Watkins v. Major*, *Dickinson v. Ead*, etc., cit. ante, Chap. II.

(f) *R. v. Reed*, C. & M. 306 (1842); cf. *R. v. Wade*, 11 Cox, 549 (1869), claim of lien.

An old decision upon an indictment for robbery goes even further. The prisoner was a poacher, who forcibly recovered from a gamekeeper some wires set for game, which the gamekeeper had lawfully taken from him under a statute legalising such seizure (*g*). It was held that evidence of the prisoner's ignorance of the statute was admissible, as being relevant to the question whether he took the wires back under a claim of right (*h*).

Here, it might be said that the prisoner's mistake was one of law. He simply did not know the provisions of the Act under which the keeper's seizure and possession of the wires were lawful. But the mistake of law led to a mistake of fact; he thought the gamekeeper was the felon, and not himself. The case was therefore comparable to that of a man killing an innocent woman in mistake for a burglar (*i*).

So, where a man's servant was indicted for feloniously obstructing the air-way of a mine, and it appeared that the act was done in obedience to the master's orders and in the *bona fide* belief that they were in pursuance of his rights, Lord Abinger, C.B., directed an acquittal, saying:—

“ If a man claims a right which he knows not to exist, and he tells his servants to exercise it, and they do so, acting *bona fide*, I am of opinion that that is not a felony in them, even if in so doing they obstruct the air-way of a mine. What I feel is this, that if these men acted *bona fide* in obedience to the orders of a superior, conceiving that he had the right which he claimed, they are not within this Act of Parliament. But if either of these men knew that it was a malicious act on the part of his master, I think then that he would be guilty of the offence charged ” (*k*).

In *R. v. Tinkler* (*l*) the prisoner, who was charged with abduction (*m*), had, without any proper motive, taken a girl out of the possession of the person rightfully having custody of her; but he alleged that the act was done in pursuance of a promise made by him to the child's father before his death, and that he did not know he was breaking the law. Cockburn, C.J., charged the jury as follows:—

(*g*) 5 Anne, c. 14, s. 4.

(*h*) *R. v. Hall*, 3 C. & P. 409 (1828); et vide *R. v. Boden*, 1 C. & K. 395 (1844); *R. v. Sturgess*, 9 Cr. A. R. 120 (1913).

(*i*) *Levet's Case*, Cro. Car. 538; 1 Hale, 474 (1638).

(*k*) *R. v. James*, 8 C. & P. 131 (1837), under 7 & 8 Geo. 4, c. 30, s. 6.

(*l*) 1 F. & F. 513 (1858).

(*m*) Under 24 & 25 Vict. c. 100, s. 55; cf. *R. v. Prince*, and *R. v. Hibbert*, ante, Chap. II.

"This being a criminal prosecution, if the jury should take this view of the case, and be of the opinion that the prisoner honestly believed that he had a right to the custody of the child, then, although the prisoner was not legally justified, he would be entitled to an acquittal."

Upon this direction the prisoner was of course acquitted.

Under claim of right, a farmer killed his neighbour's pigeons, which were doing mischief on his farm. His conviction by justices, on the ground that the killing was not justified by law and was therefore unlawful, was set aside, and Mellor, J., said :—

"I think that the statute was not intended to apply to a case in which there was no guilty mind, and where the act was done by a person under the honest belief that he was exercising a right" (n).

Again, in *R. v. Twose* (o), where the prisoner was indicted for having set fire to some furze on a common, it was proved that persons living near had occasionally burnt the furze to improve the growth of the grass, but the existence of any right to do so was denied. Lopes, J., left it to the jury to find whether the act was done "wilfully and maliciously," and directed them that "if she set fire to the furze thinking she had a right to do so, it would not be a criminal offence" (p).

This case was recently cited, in an appeal from conviction, where an outgoing tenant had destroyed some fruit trees, and it was suggested that he considered himself entitled to do so. The conviction was quashed on the ground that the jury's verdict left some room for doubt as to whether the damage was maliciously done or not (q).

Claim of right is expressly recognised, as to malicious offences against property, by a proviso in sect. 52 of the Malicious Damage Act, 1861 (r), that "nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of," and, upon a prosecution under sect. 51 of the same Act, where a number of persons at Newquay had assembled for the purpose of asserting a supposed right to dry and mend nets, etc., on a common, which they had been accustomed for upwards of sixty

(n) *Taylor v. Newman*, 9 Cox, 314 (1863), under sect. 23 of the Larceny Act, 1861.

(o) 14 Cox, 327 (1879).

(p) Cf. *Hargreaves v. Diddams*, cit. *supra*.

(q) *R. v. Rutter*, 1 Cr. A. R. 174 (1908).

(r) 24 & 25 Vict. c. 97.

years to use for that purpose, and pulled down a wooden building recently constructed in connection with the contemplated erection of a hotel there, and thrown the same into the sea, the Court affirmed the conviction, laying down the rule that the proper direction to a jury in such cases is : Did the defendants do what they did in the exercise of a supposed right ? and if on the facts before them the jury come to the conclusion that they did more damage than they could reasonably suppose to be necessary for the assertion or protection of the supposed right, then the jury ought to find them guilty (s).

From the foregoing decisions, it will be gathered that claim of right, or the defence of a mistake on the prisoner's part to the effect that his conduct was lawful, has been generally admitted by the Courts, wherever the supposed right would depend upon mixed questions of law and fact ; and that, when so admitted, it falls under the general rule of *ignorantia facti* ; so that, if the mistake were made on reasonable grounds, and were such that the supposed right would in law entirely justify the prisoner's conduct, it is regarded as a sufficient excuse.

Where, however, the defence suggested amounts substantially to no more than *ignorantia juris*, in the sense of a failure to understand or correctly to interpret any provision of the law—even though it be upon a point of difficult construction (t)—there can be no such excuse, inasmuch as no element of mistake concerning questions of fact is involved.

(s) *R. v. Clemens and Others*, 1898, 1 Q. B. 556 (per Lord Russell, C.J.) ; cf. *Evison v. Marshall*, 32 J. P. 691 (1868) ; *Brooks v. Hamlyn*, 19 Cox, 231 (1899) *R. v. Croft*, cit. Kenny, Outl., 68 (1889).

(t) *A.-G. v. Carlton Bank*, 1899, 2 Q. B. 158.

CHAPTER IV.

INFANCY.

UNDER the Roman Law, the disability of infancy seems to have had primary reference to the capacity of persons to enter into formal contracts by word of mouth ; and *infans* originally meant a babe, incapable of performing the ceremony of stipulation, because unacquainted with the art of reasonable speech.

It was not until the publication of a constitution by the Emperor Theodosius concerning the law of inheritance that the age of infancy was defined, for the particular purpose in hand, as coming to an end with the seventh year of life, *sive maturius sive tardius filius fandi sumat auspicia* (a). Another constitution of the same Emperor, embodied in Justinian's Code (b), finally recognised this as the limit of infancy for all purposes : "*Infanti, id est minori septem annis*" (c).

Under our common law the same definite and natural rule obtains in respect of the capacity to commit offences, an infant under the age of seven being conclusively presumed, for all purposes, *doli incapax* (d).

With regard to infants between seven and fourteen, the common law requires strong affirmative proof, to the satisfaction of the jury, of sufficient capacity on their part to know the nature and consequences of their conduct, and to appreciate that the acts charged against them were wrong (e).

Sometimes *res ipsa loquitur* ; but wherever sufficient evidence is forthcoming, whether arising from the circumstances of the case, from a previous conviction of a similar offence, or from testimony as to the prisoner's character and antecedents in general, the effect is the same : *malitia supplet aetatem* : the evidence of mature culpable intention suffices to rebut the legal presumption against it (f).

(a) Cod. Th., 8, 18, 8.

(b) Cod. 6, 30, 18, pr.

(c) Vide Clark, Anal., p. 69.

(d) Y. B. 30 & 31 Edw. 1, 511 ; 1 Hale, 25-8 ; Kenny, Outl., 50.

(e) *R. v. Owen*, 4 C. & P. 236 (1830).

(f) *R. v. Alice* (1338), Ken., S. C. 41.

In the old days it seems to have shocked nobody to see children, a little over seven years of age, hanged for felony (*g*), and the late Sir J. F. Stephen observed that, even in his time, the presumption against criminality of an infant between seven and fourteen was practically inoperative, or at all events operated seldom and capriciously (*h*).

Perhaps this is accounted for partly by the necessary elasticity of a presumption of the kind referred to, as applied to crimes of diverse nature and varying gravity, and partly by the fact that a child would not, in modern times, be put on trial at all, unless there were plain reasons for concluding that its conduct evinced criminal precocity of intellect.

It would, for example, take less evidence to rebut the presumption upon a charge of petty larceny than upon an indictment for murder by poisoning (*i*), or felonious possession of coining implements (*k*).

Whatever may have been the grievances of infant prisoners thirty years ago, they have now been completely redressed, juvenile status under the criminal law being elaborately regulated by the Children Act, 1908 (*l*).

Part VI. of the Act contains various provisions as to presumption and determination of the age of children, young persons, and others, *child* being defined as a person under the age of fourteen and *young person* as a person fourteen years of age or upwards and under sixteen, and a *guardian* for the purposes of the Act being "any person who, in the opinion of the Court having cognizance of any case in relation to the child, young person or youthful offender . . . has for the time being the charge of or control over the child, young person or youthful offender" (*m*).

Part V. of the Act deals with juvenile offenders—sects. 94–97 containing various provisions as to their special custody, detention, remand and committal, and sect. 98 providing for the attendance at court of

(*g*) *R. v. Dean*, 1 Hale, 25 (1629); *R. v. York*, Fost. 70 (1748); *R. v. Clark*, Winch. Ass. (1880).

(*h*) St. Hist., II., 98.

(*i*) *R. v. Vamplew*, 3 F. & F. 520 (1862).

(*k*) *R. v. Boober*, 4 Cox, 272 (1850).

(*l*) 8 Edw. 7, c. 67.

(*m*) Sects. 123 and 131.

the parent or guardian of any child or young person charged with an offence.

Sect. 99 provides that—

“(1) Where a child or young person is charged before any Court with any offence for the commission of which a fine, damages, or costs may be imposed, and the Court is of opinion that the case would be best met by the imposition of a fine, damages, or costs, whether with or without any other punishment, the Court may in any case, and shall if the offender is a child, order that the fine, damages, or costs awarded be paid by the parent or guardian of the child or young person instead of by the child or young person, unless the Court is satisfied that the parent or guardian cannot be found, or that he has not conduced to the commission of the offence by neglecting to exercise due care of the child or young person.

“(2) Where a child or young person is charged with any offence, the Court may order his parent or guardian to give security for his good behaviour.

“(3) Where a Court of summary jurisdiction thinks that a charge against a child or young person is proved, the Court may make an order on the parent or guardian under this section for the payment of damages or costs, or requiring him to give security for good behaviour, without proceeding to the conviction of the child or young person.”

The same section provides for the giving an opportunity to the parent or guardian of being heard (*n*); for the recovery of fines and penalties (*o*); and for appeals by parents and guardians against orders made upon them (*p*).

Sect. 100 removes any disqualification attaching to felony committed by a child or young person; and sect. 101, among other things, limits the amount of any costs ordered to be paid by the infant in addition to a fine.

Under sect. 102—

“(1) A child shall not be sentenced to imprisonment or penal servitude for any offence, or committed to prison in default of payment of a fine, damages, or costs.

“(2) A young person shall not be sentenced to penal servitude for any offence.

“(3) A young person shall not be sentenced to imprisonment for an

(*n*) Sub-sect. 4.

(*o*) Sub-sect. 5.

(*p*) Sub-sect. 6.

offence or committed to prison in default of payment of a fine, damages, or costs, unless the Court certifies that the young person is of so unruly a character that he cannot be detained in a place of detention provided under this Part of this Act, or that he is of so depraved a character that he is not a fit person to be so detained " (q).

By sect. 103 the death sentence is abolished, in the case of all children and young persons, detention during His Majesty's pleasure being substituted therefor.

Further provisions are made whereby special detention under the Act may be substituted for other punishment, upon conviction of attempt to murder, of manslaughter, or of wounding with intent to do grievous bodily harm (r), or of any offence punishable in the case of an adult with penal servitude or imprisonment (s).

Sect. 107 enumerates, and directs the Court to take into consideration, the various ways in which children and young persons charged with offences may be dealt with under the provisions of this or any other Act.

This statute makes several new departures in respect of criminal liability. The most important innovations as regards imputability are the throwing upon parents and guardians of criminal responsibility for the conduct of infants, and the large recognition given to an obvious principle hitherto often neglected, viz., that the punishment of children and young persons ought to be inflicted rather with a view to their reformation than with the object of making examples of them.

With reference to the incapacity of infants to commit certain species of crime, it is to be observed that a boy under fourteen is *conclusively* presumed incapable of rape as principal in the first degree (t), or of assault with intent to commit rape (u), or of carnal knowledge and abuse of a girl (x), but may of course be convicted of indecent assault (y).

(q) Vide *R. v. Bradford*, 7 Cr. A. R. 42 (1911).

(r) Sect. 104.

(s) Sect. 106.

(t) *R. v. Groombridge*, 7 C. & P. 582 (1836); *R. v. Philips*, 8 C. & P. 736 (1839); *R. v. Brimilow*, 9 C. & P. 366 (1840).

(u) *R. v. Eldershaw*, 3 C. & P. 396 (1828).

(x) *R. v. Waite*, 1892, 2 Q. B. 600.

(y) *R. v. Williams*, 1893, 1 Q. B. 320.

Infants between fourteen and twenty-one are at common law privileged in some cases of crime by mere non-feasance (z), for the obvious reason that they have no command of their financial resources, and laches cannot be imputed to them (a).

So, in default of evidence as to the incurring of debts for necessities, the conviction of an infant under sect. 12 of the Debtors Act, 1869, was annulled, on the ground that he could have no trade creditors (b).

These incapacities may be compared to the inability of bodies corporate to commit certain kinds of offences, the perpetration of which is incompatible with their range of operation, and the appropriate punishment for which is of such a kind that it could not be inflicted upon an artificial person (c).

With reference to the salutary punishment of whipping (d)—which may be inflicted upon any boy under fourteen convicted summarily of an indictable offence (e)—it may be thought curious that, under an Act (f) empowering the Court to order that punishment “in the case of an *offender* whose age does not exceed sixteen years,” whipping cannot be inflicted upon a boy who was under sixteen at the time of the offence committed, but attains that age before conviction (g). Adolescent offenders should therefore be prosecuted to conviction as speedily as possible.

(z) Vide Bl. Comm., IV., 22 ; Kenny, Outl., 51.

(a) Co. Litt. 357.

(b) *R. v. Wilson*, 5 Q. B. D. 28 (1879).

(c) Vide Kenny, Outl., 64.

(d) Vide the Whipping Act, 1862.

(e) Summary Jurisdiction Act, 1879, s. 10 ; Children Act, 1908, s. 128 (1).

(f) Criminal Law Amendment Act, 1885, s. 4 ; cf. Larceny, Malicious Damage, and Offences Against the Person Acts, 1861.

(g) *R. v. Cawthron*, 9 Cr. A. R. 48 (1913).

CHAPTER V.

INSANITY.

PERHAPS in no other chapter of the law is there so much difficulty in assessing the value of judicial decisions as in that concerning the defence of insanity in criminal cases (a).

The earlier trials were conducted in conditions of mediæval darkness, with regard to the ideas then prevalent as to the nature of mental disease, its effect upon the capacity of the patient in thought and conduct, its symptoms and treatment, and in short as to everything constituting it or affected by it (b).

But even the most recent judicial pronouncements cannot without large reservations be accepted as defining the law, consisting as they do for the most part of directions to juries, framed rather with a view to assisting a decision upon special facts appearing in the evidence than with the wider object of settling or following general rules or doctrines.

Moreover, there are always two ways of stating the same truth, the one tending to conviction, the other recommending an acquittal; and "*tutius semper est errare in acquietando quam in puniendo, ex parte misericordiæ, quam ex parte justitiæ*" (c). •

Passages from the summing-up in a border-line case of murder by a more or less weak-minded prisoner, where the judge's chief object is to impress upon the jury the necessity of caution against an ill-considered conviction, cannot safely be accepted as either laying down a new rule of law or introducing a novel modification of an old rule already established.

Still less can a brief direction to a jury upon particular facts, *e.g.*, to the effect that "the question is whether the prisoner was insane at the time" (d), or, "Was the prisoner unable to control his actions in

(a) Cf. St. Hist., II., 152.

(b) Vide Hale, I., 29—37.

(c) Hale, II., 290.

(d) *Brocklehurst's Case* (1884); vide Renton, 901.

consequence of a disordered mind?" (e) be relied upon as a guiding rule in other cases.

"When a judge sums up, he is not composing a law treatise, but speaking with regard to the facts of the particular case" (f).

The common law with reference to the excuse of insanity may be shortly stated in one sentence. If by mental disease a prisoner is shown to have been prevented, at the time of the alleged offence charged against him, from subsuming the fact under the law, he is entitled to an acquittal (g), or now, more strictly, to a statutory verdict (h) on that ground; but there is no further or other immunity from conviction on the ground of mental affliction (i).

In other words—sanctioned by use in the criminal trials of centuries—a prisoner, to claim immunity on the ground of insanity, must be clearly shown to have been thereby prevented from understanding the nature and quality of his act, or from knowing that it was wrong (k).

In commenting upon this ancient definition of the "knowledge test," Dr. H. Oppenheimer observes that neither of the words *nature* and *quality* ought to be rejected as mere surplusage (l):—

"For, on analysing the minimum of knowledge which a man must possess in order that it may be properly said of him that he knows what he is doing, and that that which he does is a crime, we shall find that, corresponding with the triad: *nature, quality, criminality*, there are three aspects in which that knowledge presents itself:

"(1) He must be aware of the identity of the actor, of the true nature of the material objects upon which he acts, of the operation of the physical agencies which he sets in motion, and of so much of the existing facts as are ingredients of the *corpus delicti*. . . .

"(2) He must have such knowledge of the abstract principles of law as to appreciate that certain classes of acts are threatened with criminal sanctions.

"(3) He must be competent to subsume a concrete act under its

(e) *R. v. Duncan*, ib.

(f) *R. v. Scholey*, 3 Cr. A. R. 183 (1909), per Lord Alverstone, C.J.

(g) Y. B. 21 Hen. 7, f. 31, Mich., pl. 16 (1505); vide Ken. S. C. 43.

(h) Trial of Lunatics Act, 1883, *infra*.

(i) *R. v. Stokes*, 3 C. & K. 185 (1848).

(k) Vide cases cited below, and *R. v. Martin*, Shel. 465 (1829); *R. v. Higginson*, 1 C. & K. 129 (1843); *R. v. Vaughan*, 1 Cox, 80 (1844); *R. v. Davies*, 1 F. & F. 69 (1858); *R. v. Richards*, ib. 87.

(l) Cf. *R. v. Hay*, and note thereon, Ken. S. C., 53 n. (*post*, Chap. X.).

proper legal category ; he cannot otherwise be said to understand the legal character, the legal significance or import of his deed. . . . He must have such intelligence left as enables him roughly to appreciate what sort of a crime he is committing, and in a popular way to classify his act according to its gravity " (m).

Evidently, if a man's mental aberration should render him unable to appreciate the bearing of his own conduct in any of these respects, he would be unable to range the fact under the law ; and he must of necessity be absolved, by any reasonable system of jurisprudence, from obedience to a command which he could not by any possible means be induced to understand.

The extreme doctrine preached by a few unthinking people, that the mere fact of insanity should suffice as a defence against conviction of crime, hardly merits serious attention, inasmuch as it takes no account of the unchangeable principles upon which criminal liability is based (n). However plausible may be the " humanitarian " views prompting such theories, they are of the mischievous kind that would look upon all crime as a mere misfortune or disease, and would endeavour to cure or alleviate its effects on the character of the patient with more regard to his personal comfort than to the safety or welfare of the community at large. Such ideas furnish better results when elaborated in fairy tales than when adopted for experimental purposes in real life (o).

" One matter put forward is this : the threat of punishment does not deter mad people ; they understand the threat, and yet commit crimes. and because they cannot help it. Now, if by the words ' does not deter ' is meant does not *always* deter, I admit it. But the same is true of men in their perfect senses. They are not always deterred by the threat of punishment ; and if that were a reason for not punishing insane persons it would equally be a reason for not punishing the sane. If by the words ' does not deter ' is meant *never* deters, I wholly deny it. It does not deter as often as it ought, because madmen are cunning enough to know that from the way the law is administered they can commit crimes with less chance of punishment than sane persons can. But to say that they are uninfluenced by the threat of punishment is to say what is contrary to everyone's experience and knowledge " (p).

Whatever views may be held as to the special treatment of insane

(m) Oppenh., 143-6.

(n) Vide Oppenh., Chaps. 6 and 8.

(o) Vide " Erewhon " and " Erewhon Revisited," by Samuel Butler.

(p) Baron Bramwell, art. " Insanity and Crime," p. 894.

offenders after their conviction, the idea that they should be acquitted of their crimes by reason of their mere insanity, apart from any question as to the effect thereof upon their capacity to understand and obey the law, is a gospel of absurdity, unsupported by the opinion of any respectable authority in this country.

"All who have had the opportunity of studying insanity know full well that, with comparatively few exceptions, insane persons are not only powerfully influenced, but materially controlled, by the same motives which influence and control those who are still mixing in the world, and who have never been suspected of mental derangement" (g).

The famous Answers of the judges in *McNaghten's Case* afford a carefully prepared statement of the law as it was understood by the highest judicial authorities in the year 1843. The prisoner, upon trial for murder, was shown by medical evidence to have been affected by morbid delusions, which carried him out of his own control and left him no perception of right and wrong. The symptoms of his disease and its effects upon him were fully described to the Court by medical witnesses, some of whom had examined him, but others saw him only in Court, and formed their opinion upon the evidence of the others. In particular, Dr. Monro deposed that in his opinion "a partial delusion may exist, depriving a person of all self-control whilst the other faculties may be sound," or, in other words, that "monomania may exist with general sanity."

Tindal, C.J., directed the jury that if they should be of opinion that the prisoner was not sensible, at the time he committed the act, that he was violating both the laws of God and man, then he would be entitled to a verdict in his favour; but if on the contrary they were of opinion that he was in a sound state of mind, then their verdict must be against him.

Upon this rather loose direction the jury acquitted the prisoner (r).

The importance of the case arose, however, not so much in the course of the trial itself, as upon a subsequent debate in the House of Lords, wherein it was determined that the opinion of the judges should be taken upon the law affecting the defence of insanity. All the judges

(g) Wood, "Plea of Insanity"; vide Tayl., Princ., 870.

(r) *R. v. McNaghten*, 10 Cl. & F. 200; 59 R. R. 85.

attended the House, and certain questions of law were put to them, without argument. They conferred together, and, with the exception of Maule, J., answered the questions *seriatim* as follows, their opinions being delivered to the House by Tindal, C.J., who, however, protested that "they deemed it at once impracticable, and at the same time dangerous to the administration of justice, if it were practicable, to attempt to make minute applications of the principles involved in the Answers."

QUESTIONS.

"1. What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons : as, for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some public benefit ?

"2. What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence ?

"3. In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed ?

"4. If a person, under an insane delusion as to the existing facts, commits an offence in consequence thereof, is he thereby excused ?

"5. Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion, whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any and what delusion at the time ? "

ANSWERS.

"1. Assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion, that, notwithstanding the party did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law, by which expression we understand your Lordships to mean the law of the land.

"2 and 3. That the jury ought to be told in all cases that every man is

presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction ; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong, which mode, though rarely if ever leading to any mistake with the jury, is not as we conceive so accurate when put generally, and in the abstract, as when put as to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction, whereas the law is administered upon the principle that everyone must be taken conclusively to know it without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable ; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong ; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

"4. The answer to this question must of course depend on the nature of the delusion ; but making the same assumption as we did before, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

"5. We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide : and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science

only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."

Maule, J., after protesting that the questions were put without reference to the facts of any particular case, and for no particular purpose which might limit or explain the generality of their terms, that the answers given might embarrass the administration of justice, and that there had been a very short time for consideration, gave separate answers of his own, the essential portions whereof (as to questions 1 and 4) deserve, though they have not usually received, at least as much attention as the above.

"1. There is no law, that I am aware of, that makes persons in the state described in the question not responsible for their criminal acts. To render a person irresponsible for crime on account of unsoundness of mind, the unsoundness should, according to the law as it has been long understood and held, be such as to render him incapable of knowing right from wrong.

"2. If, on a trial such as is suggested in the question, the judge should have occasion to state what kind and degree of insanity would amount to a defence, it should be stated conformably to what I have mentioned.

"3. There are no terms which the judge is by law required to use. They should not be inconsistent with the law as above stated; but should be such as, in the discretion of the judge, are proper to assist the jury in coming to a right conclusion as to the guilt of the accused.

"4. In answer to this question, Maule, J., referred to his answer to question 1."

It seems strange that any lawyer should be found to argue that the answers of the judges on this occasion possessed any inherent authority. Yet Sir J. F. Stephen entertained misgivings before going so far as to pronounce their authority "questionable" (*s*); and seems in his Digest (*t*) to have ascribed to them an authority exceeding that of any tribunal which ever sat in judgment on a felon (*u*).

In point of law, answers given by judges, however formally, to questions propounded to them whether by the King or by either House of Parliament, possess no binding authority whatever. They are opinions, not judgments.

(*s*) St. Hist., II., 153-4.

(*t*) St. Dig. (1st ed.), App., note I.

(*u*) Vide Oppenh., pp. 22-4.

The chief value of these answers lies in the fact that, by a full and correct statement of the main doctrine of responsibility, as settled by authoritative decisions prior to 1843, they have afforded a solid basis for the recognition and enforcement of that doctrine, and its adaptation to modern social conditions. All the useful results of ancient learning being gathered together in these considered pronouncements, it has been rendered unnecessary for the modern lawyer to collect his first principles from the criminal trials of semi-barbarous times.

It must be added that, although the answers had originally no inherent authority or binding force, they now possess that kind of derivative authority which may be said to attach to them in view of their having been constantly referred to, and their language having been judicially adopted, in most of the important criminal trials dealing with the defence of insanity, from the time they were uttered to the present day.

It will be observed that the scope of answers 1 and 4 was expressly confined to the matters covered by the relative questions—viz., the law applicable to cases of insane delusion, or what has been called “partial insanity.” As enlightened modern opinion on this part of the subject differs vitally from that of seventy years ago, these particular answers are now of little if any value, except so far as they serve to throw light upon the combined answer to questions 2 and 3, which was framed with the intention of covering a wider ground, and has always been accepted as defining the rule of law applicable to any case (whether of alleged delusions or not) where irresponsibility is claimed on the ground of unsoundness of mind.

The only ground upon which such a defence can properly succeed is that the prisoner was prevented from understanding the nature or quality of his act, or from knowing that it was forbidden by the law of the land.

It is not true that, as seems to have been unnecessarily admitted (x), the application of the “knowledge test” to the particular time and matter of the act charged was a novelty invented by the judges, and appearing for the first time in English law in their answers.

(x) Oppenh., p. 23 ; et vide pp. 253 et seq.

On the contrary, this doctrine was recognised as early as 1724, when Tracey, J., charged a jury that—

“It is not every kind of idle and frantic humour of a man, or something unaccountable in his actions, which will show him to be such a madman as is to be exempted from punishment; but that where a man is totally deprived of his understanding and memory, and does not know *what he is doing*, any more than an infant or a wild beast, he will properly be exempted” (y).

The progress of ideas during two centuries has enabled us to realise that there may be mental disorders, very different from the brutish state described, which would yet have the effect spoken of as depriving a man of the power of knowing what he is doing, *i.e.*, realising the criminal nature of his acts, and the punishment attached to them by the law. But, with this reservation, the direction above quoted accurately defined the knowledge test as referring to a man's appreciation of the illegality of the particular act charged against him.

Again, three years before the answers were given, Denman, J., directed a jury that—

“Persons *prima facie* must be taken to be of sound mind till the contrary is shown. But a person may commit a criminal act, and yet not be responsible. If some controlling disease was in truth the acting power within him, which he could not resist, then he will not be responsible. . . . The question is, whether the prisoner was labouring under that species of insanity which satisfies you that he was quite unaware of the nature, character and consequences of the *act he was committing*, or in other words whether he was under the influence of a diseased mind, and was really *unconscious, at the time he was committing the act, that it was a crime*” (z).

One could not desire clearer passages than those italicised to show that the present legal test of knowledge, as referring to the act itself, and not to a man's conduct in general, is identical with that applied by the Courts previously to 1843, and that the answers of the judges on this point correctly stated a rule of law well understood at the time and established by prior authority.

In interpreting the “knowledge test” as strictly referring not to

(y) *R. v. Arnold*, 16 St. Tr. 695.

(z) *R. v. Oxford*, 9 C. & P. 525 (1840).

religious or moral law, but to the law of the land, the combined answer to questions 2 and 3 again correctly stated the law as previously settled in the courts.

Sir J. F. Stephen seems to have regarded it as an open question whether the test is to be taken as referring to knowledge of criminality or knowledge of sinfulness (*a*). There is indeed, at first sight, an inconsistency between the doctrine that all men are conclusively presumed to know the law, and that which prescribes (as the test of exemption by reason of insanity) the question whether or not the prisoner was capable of knowing, and did in fact appreciate, the law in its application to his conduct.

The inconsistency is, however, only apparent. The full operation of the presumption as to legal knowledge is confined to the conduct of sane persons of full age. We have seen that infancy forms an exception to it. The doctrine of insanity forms another exception to this extent, that the presumption does not apply if the prisoner is shown to have been deprived, by unsoundness of mind, of his power of legal discrimination. Upon the raising of this defence, the presumption of legal knowledge ceases to be a *presumptio juris et de jure*, and may be rebutted by evidence as to the prisoner's actual state of mind at the time of the conduct in question. In default of sufficient evidence on that point, however, the presumption referred to operates under the special form of another presumption, viz., that every man is presumed to be sane enough to know the law until the contrary is proved.

The suggested doubt, as to whether the knowledge test refers to religion or to positive law, has no real justification, but is traceable to a few doubtful phrases in directions to juries during the earlier part of last century.

In the case of Bellingham, who was condemned and executed for the murder of Spencer Perceval, First Lord of the Treasury, against whom he had a supposed grievance, Mansfield, C.J., directed the jury that, for an acquittal of the prisoner on the ground of insanity, it must be proved beyond all doubt that he was incapable of judging between right and wrong, and did not consider that murder was a crime against the *laws of God and nature*; and that there was no other proof of insanity which would excuse murder, or any other crime.

(a) St. Dig., art. 28 (Notes and Illustrations); cf. Oppenh., pp. 34-6.

"The question is, whether you are satisfied that the prisoner had a sufficient degree of capacity to distinguish between good and evil, and to know that he was committing a crime when he committed this act ; in that case, you will find him guilty " (b).

The expression " an offence against the laws of God and nature " was again used, by Lord Lyndhurst, C.B., when directing the jury in *R. v. Offord* (c). It is an antiquated expression, and may now be regarded as out of date ; for there never was any such thing as a law of nature (d) ; and the Divine law has long since ceased to have any close connection with the law of the land.

The combined answer of the judges to questions 2 and 3 sufficiently points out the difficulty of giving an absolutely strict exposition of the rule of law in directing a jury upon a question of mental capacity. Such directions usually arise upon a charge of murder, which is an offence repugnant to all codes of law, religion and morality ; and a general direction upon the question as to the prisoner's knowledge of right and wrong not only sufficiently meets such a case, but is preferable to a learned disquisition upon the niceties of the law. Probably all that was meant in *R. v. Bellingham*, *R. v. Offord*, and other similar cases in which Divine law has been referred to, was that the jury must be satisfied that the prisoner knew the act not merely to have been forbidden by law, but also to have been a most heinous offence. At any rate, the preponderance of authority, both before and after 1843, is in favour of the more logical view, that the " knowledge test " refers, primarily if not exclusively, to the prisoner's capacity of judging the character of his act under the law of the realm.

Thus, in *R. v. Parker* (e), the charge was that of aiding the King's enemies, which is not necessarily an offence against either the Divine or the moral law. The defence of insanity being set up, the Attorney-General was permitted to address the jury to the effect that they must be properly satisfied that at the time when the crime was committed the prisoner did not know " right from wrong." The expression used, in such a connection, could only mean " legal from illegal " ; and if that were the test for treasonable acts the same test would apply to homicide.

(b) *R. v. Bellingham*, Collinson, 636 (1812).

(c) 5 C. & P. 168 (1831).

(d) Bentham, Chap. 2, par. 14, n.

(e) Collinson, 477 (1812).

Again, in *R. v. Oxford* (f), the concluding words of the summing-up clearly intimated that the point on which the jury must find an answer was, whether the prisoner knew his act to be a *crime*.

In later cases, whenever judges have found it necessary to define the rule of law precisely, they have made it clear that the question is one of capacity to understand the character of the act charged in relation to the law of the land. Thus, in the much-discussed case of Dove, who was tried for poisoning his wife with strychnine, Bramwell, B., directed the jury as follows :—

“Every person at the age of discretion is, unless the contrary be proved, presumed to be sane, and to be accountable for his actions. . . . To establish a defence on the ground of insanity, it must be clearly proved that at the time of the committing of the act the party accused was under such a defect of reason, from disease of the mind, as not to know the nature or quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong. . . . Of course, that means, doing an act prohibited by law, because a man might imagine that killing was a right thing to do, and it might be contrary to law. For instance, he might think it right to take from the rich, and give it to the poor; but if he did it, not knowing it was wrong, he must not know that the thing which he so did was what the law will punish him for” (g).

On the subject of delusions, the answers of the majority of the judges cannot now be regarded as affording any useful guidance, inasmuch as they were directed to questions based upon radically wrong views of psychology, and are irreconcilable with the results of modern science.

The doctrine of partial insanity, as stated in the questions addressed to the judges, and as recognised in their answers (particularly that to the fourth question), was a novelty in English law, for which no authority existed at the time (h), and which remains unsupported by any real authority to the present day. There is the less reason for feeling any hesitation in acknowledging the incorrectness of the answer referred to, or in concluding with Dr. Oppenheimer (i) that the answer of Maule, J., was preferable, as giving the correct rule to be followed in all cases of insanity, whether alleged to be accompanied with delusions or not.

(f) Vide *supra*.

g) *R. v. Dove*, Times, 17—20 July, 1856; St. Hist., II., 177; Rent., 900-1.

(h) Vide Oppenh., p. 23.

(i) Oppenh., p. 221.

In one sense, to be sure, a delusion is necessary to any kind of insanity recognisable as affording an excuse for crime. The terms of the "knowledge test" involve the existence of a delusion in this sense—that the prisoner must have experienced some lack of knowledge or appreciation of what he was doing. Either he must have misunderstood the nature or quality of his act, or else he must have thought it to be innocent, or at least failed to appreciate its full guilt. In that sense only can delusion be said to be essential to the excuse of incapacity by reason of insanity.

This, however, is not the sense of the word as used in the Questions and Answers. They were framed upon the supposition, probably founded on Dr. Monro's evidence, that there might be cases of partial insanity such as he described, in which the patient would suffer from some specific delusion, as to the existence of an imagined fact, or the non-existence of an actual fact, and that upon other subjects, or in other respects, the patient's mental capacity might remain perfectly healthy. Upon such a hypothesis the judges formed the conclusion expressed in their answer to the fourth question, that there may be a corollary to the legal rule, whereby the jury ought to be directed to assume that state of things to be true which the prisoner, misled by his "specific delusion," believed to exist.

As has been frequently pointed out by medical and other writers (*k*), this was an absurd solution of an impossible problem; and the most that can be said for it is that, in some cases, it might chance to work no substantial injustice.

"Mind is one and indivisible. We cannot, therefore, in any correctness of language, speak of general and partial insanity. If the being or essence which we term the mind is unsound on one subject, provided that unsoundness is at all times existing upon that subject, it is quite erroneous to suppose such a mind really sound upon other subjects. It is only sound in appearance" (*l*).

The false corollary set up by the judges in 1843, to meet the supposed case of partial insanity, is supported by no real authority, and may be asserted with confidence (*m*) to form no part of the Law of England. It was merely a *faux pas* in psychological theorisation, based on the misleading evidence in *McNaghten's Case* (*n*).

(*k*) Vide Oppenh., Chap. 12.

(*l*) Per Lord Brougham, *Waring v. Waring*, 6 Moo. P. C. 341 (1848).

(*m*) Face Oppenh., p. 19.

(*n*) Tuke, I., 307-8.

Another difficulty connected with the subject of delusions is the suggestion, to be gleaned from some half-dozen of the poorer sort of directions to juries, that unless there be some form of delusional insanity there can be no excuse for crime. This is undoubtedly a fallacy (o), but here, again, there is no real authority in support of the false theory suggested. In almost all the cases referred to, the supposed necessity of a delusion has been suggested only as a guide to the solution of the real problem: whether the prisoner knew that he was committing a crime. The words in question appear indeed frequently to have been used merely as synonymous with, or descriptive of, that result of insanity which consists in the patient's failure to comprehend the bearing of the law upon his conduct.

In that sense, Le Blanc, J., directed the jury, in a case where the prisoner, an epileptic found insane upon inquisition, was convicted and executed for unlawful wounding, that if he was capable of distinguishing right from wrong, and not under the influence of such a *delusion* as disabled him from discerning that he was doing a wrong act, he would be guilty (p).

This direction was quoted with approval to a jury by Martin, B., who, in the course of a rambling direction of his own, several times insisted on the necessity of delusions. He plainly considered specific delusions necessary in order that a man might lose the capacity to discriminate between right and wrong, but he concluded with a correct statement of the rule of law that—

“If he knew what he was doing, and that it was likely to cause death, and was contrary to the law of God and man, and that the law directed that persons who did such acts should be punished, he was guilty of murder” (q).

Lord Denman is said to have condemned it as “a presumption of knowledge which none but the great Creator could possess,” to say that a man was irresponsible, without proof that he was labouring under some delusion (r), but he was probably only intending to lay down the necessity of showing some symptomatic or other clear evidence in support of the plea of insanity.

(o) Vide Oppenh., pp. 29—31.

(p) *R. v. Bowler*, Collinson, 673, n. (1812).

(q) *R. v. Townley*, 3 F. & F. 839 (1863).

(r) *R. v. Smith*, Oppenh., p. 31; cf. *R. v. Barton* (post, Chap. X.).

A young man gave himself up for the murder of a boy, whose throat he had cut. He said he was tired of life, and had made up his mind to murder somebody. It was proved that he had often been absent-minded, and had been known to eat soap, for the mere pleasure of it; and that his mother and brothers were weak-minded. Wightman, J., told the jury:—

“It was urged that the prisoner did the act to be hanged, and so was under an insane delusion. But what delusion was he under? So far from it, it showed that he was quite conscious of the nature of the act, and of its consequences. He was supposed to desire to be hanged, and in order to attain the object, committed murder. That might show a morbid state of mind, but not delusion. Homicidal mania, again, as described by the witnesses for the defence, showed no delusion; it merely showed a morbid desire for blood. Delusion meant the belief in what did not exist. The question for the jury was, whether the prisoner, at the time he committed the act, was labouring under such a species of insanity as to be unaware of the nature, the character, or the consequences of the act he committed; in other words, whether he was incapable of knowing that what he did was wrong.”

Upon this direction the prisoner was convicted and executed (s).

Where a prisoner was charged with the deliberate but apparently motiveless murder of his wife, Rolfe, B., after referring with approval to the legal test as propounded in the judges' answers, correctly explained to the jury that the only importance attaching to delusions was to afford a clue to the prisoner's state of mind as affecting his appreciation of the legal character of the act charged against him:—

“The conclusion seemed irresistible, that the prisoner was to some extent labouring under a delusion; but he was not exempt from responsibility because he was labouring under a delusion as to his property, unless that had the effect of making him incapable of understanding the wickedness of murdering his wife. But when that was the question they had to consider, he could not say that it was altogether immaterial that he was insane on one point only. Indeed, his insanity on that point might guide them to a conclusion as to his insanity on the point involved in this case” (t).

In a case at the Maidstone Assizes, Byles, J., is said to have laid it

(s) *R. v. Burton*, 3 F. & F. 772 (1863).

(t) *R. v. Layton*, 4 Cox, 149 (1849).

down in plain terms that "there are instances in which a plea of insanity may properly be allowed, although no morbid delusion can be proved" (u).

The theory that it is necessary to prove the existence of specific delusions, in order to arrive at the conclusion that a prisoner had no sound appreciation of the character of his act, may be safely dismissed, as a proposition inherently absurd and based upon no sufficient authority.

The opinion has been expressed by many eminent authorities that the excuse for crime afforded by our law is not sufficiently wide, in view of the various phases of insanity in which it finds no application (x).

In an *obiter dictum* upon a case of *delirium tremens* (y) Stephen, J., made a curious endeavour to meet this criticism by restating the rule in such an expanded form as would afford excuse for crime even to perfectly sane persons, provided that at the time of the act committed they were suffering the paroxysms of a violent toothache, or experiencing the "toxic insanity" (z) which precedes a fit of gout:—

"A person may be both insane and responsible for his actions, and the great test laid down in *McNaghten's Case* was whether he did or did not know at the time, that the act he was committing was wrong. If he did, even though he were mad, he must be responsible. But if his madness prevented that, then he was to be excused. As I understand the law, any disease which so disturbs the mind that you cannot think calmly and rationally of all the different reasons to which we refer in considering the rightness or wrongness of an action,—any disease which so disturbs the mind that you cannot perform that duty with some moderate degree of calmness and reason, may be fairly said to prevent a man from knowing that what he did was wrong."

With this may be compared Stephen's definition of *sanity* as existing "when the brain and the nervous system are in such a condition that the mental functions of feeling and knowing, emotion, and willing, can be performed in their regular and usual manner" (a).

This definition does not even satisfy the medical critics, who find

(u) *R. v. Burton*, Tayl., Princ., 867 (1862).

(x) Vide Tuke, v. I., pp. 313—319; St. Hist., II., 163; Mercier, Cr. Resp., pp. 202-4 et passim, *sed vide* pp. 215—223; cf. Kenny, Outl., pp. 52-3.

(y) *R. v. Davis*, *post*, Chap. VI. (1881).

(z) Vide Poore, p. 413.

(a) St. Hist., II., 130.

numerous faults in it, both from the author's point of view and from their own (b).

To force such extended meanings into the famous Answers, and into the numerous judicial decisions defining the law of insanity, would be merely to rob words of their legitimate meaning. The *dictum* of Stephen, J., in *R. v. Davis* is not good law, and his definition of sanity is not good sense (c).

There are undoubtedly many cases of insanity to which the limited rule of exemption does not apply, and it is for this reason that the law of England on the subject has been fiercely attacked by medical writers. It does not lie upon the present writer to defend it, for that task has been recently performed (d) with such ability as to convince any dispassionate person not only that the test applied by our Courts is based upon reasonable grounds, but that its maintenance is absolutely necessary for the safe government of society.

The most plausible form of the attack is, that the law does not admit the excuse of "irresistible impulse"; and the arguments on that point will have to be considered in connection with the principle of Compulsion, or Absence of Volition, whereby a man is absolved from criminal liability in respect of matters in no degree dependent upon his wish, or choice of action (e).

Full information will be found elsewhere (f) upon the wider controversy as to whether our law ought not to adopt the principle supposed to be embodied in the French system, of allowing any form of insanity *per se* to excuse the patient in respect of any crime he might feel disposed to commit. The results of Dr. Oppenheimer's researches may be stated to be: that the doctrine of the criminal responsibility of lunatics, as defined by English law, is the only one justifiable according to the principles of general jurisprudence; that, as applied in modern practice, it leads to no substantial injustice; and that no other doctrine which could be substituted for it has yet been found, in the administration of foreign systems of law, to yield or promise satisfactory results.

(b) Vide *Medico-Legal Journal*, v. II., p. 190, article by Dr. J. C. Bucknill; Mercier, Cr. Resp.

(c) Oppenh., pp. 32-4.

(d) Oppenh., *passim*.

(e) Vide Chap. X., *post*.

(f) Oppenh., Chaps. 6, 15, et *passim*.

Many of those who have attacked the present system will be found either to have misunderstood the meaning or application of the legal rule of exemption, or else to have laboured under an entire misconception as to the reason for its existence. Our criminal law never has professed to excuse insane persons on the ground of their insanity, or on the ground of any particular kind of insanity; it excuses them only when their insanity (of whatsoever description it may be) has placed them in the predicament of being unable to appreciate the binding force of law as applied to their conduct.

"The question is, whether the prisoner was or was not responsible when he committed the act; not whether he was not guilty on the ground of insanity. . . . The issue is whether or not, when he did the act, he was legally responsible; in other words whether he knew its nature, and knew that it was wrong. The distance indeed between the extreme points of manifest mania and perfect sense is great; but they approach by gradual steps and slow degree. The law however does not say that when any degree of insanity exists the party is not responsible, but that when he is in a state of mind to know the distinction between right and wrong, and the nature of the act he commits, he is responsible" (g).

Critics have also frequently ignored the prerogative of mercy, as affecting the administration of our law, or at any rate have treated it as a matter of no account. Thus, with reference to the case of persons on whose behalf the plea of insanity has been unsuccessfully urged at their trial, but who have afterwards been reprieved by the Crown, it has been objected even by a lawyer: "If a reprieve is allowed in such cases, why not an acquittal on the ground of insanity?" (h).

But the business of the Courts is to see the laws enforced, without making undue concessions to the weak-minded (i) or to any other class of persons. "Our Constitution has wisely left the prerogative of mercy in the hands of the Sovereign, and cases where the administration of the law works hardship to the individual are the appropriate occasions for its exercise" (k).

(g) *Per Erle, J., R. v. Leigh*, 4 F. & F. 915 (1866); cf. *R. v. Roberts*, *Tayl. Princ.*, p. 869, *per Bramwell, B.* (1860), and *R. v. Westron*, *ib.* 872 (1856).

(h) *Everest*, p. 49.

(i) *Vide R. v. Alexander*, 9 Cr. A. R. 139 (1913), and as to treatment of defectives in summary cases, or after conviction, *R. v. McQueen*, 8 Cr. A. R. 89 (1912), and references to Mental Deficiency Act, *post*.

(k) *Oppenh.*, p. 246.

To secure that the prerogative shall be exercised, not in a capricious manner, but according to settled principles of expediency and propriety, is the business not of the law but of public opinion.

The Court of Criminal Appeal has repeatedly refused to take cognizance of insanity as a ground for the quashing of a conviction, unless it has happened to have been such as to bring the case within the rule of law as defined by the judges in 1843.

Where it was urged, upon an appeal by a condemned murderer, that when the crime was committed the appellant was suffering from that form of epileptic insanity called *petit mal*, "a disease which at times manifested itself by violent outbursts of rage, in which the patient might perpetrate the most awful crimes, and shortly after have no recollection," and various circumstances were adduced pointing to that conclusion, the Court nevertheless refused application for leave to appeal, saying:—

"Having regard to the onus on the defence when the only defence raised was that of insanity, and to the legal definition of insanity, even assuming that the proposed evidence had been before the jury, and had been accepted by them as it had been read by the Court, they might still have returned a verdict of *guilty* without being unreasonable. . . . The Court wishes, however, to say that the passing of the Act under which this application was made in no way interferes with the prerogative of mercy exercised by His Majesty; it in no way alters, qualifies, or diminishes the powers or duties of the Secretary of State in advising His Majesty as to the exercise of that prerogative; and though this application must be refused, because the evidence brought before the Court will not justify them in granting the leave asked for, still, matters have been laid before them which, in their opinion, might properly be brought to the notice of the Home Secretary" (l).

A similar course has been taken in numerous other cases, appellants being referred by the Court to the Home Secretary, who is not only unfettered by the unchangeable rule of law, but has better opportunities than the Court of reviewing such circumstances as heredity, family history, and the general antecedents of the prisoner (m).

(l) *R. v. MacDonald*, 1 Cr. A. R. 262 (1908).

(m) Vide *R. v. Atkins*, 1 Cr. A. R. 69 (1908); *R. v. Atherley*, 3 id. 165 (1909); *R. v. Victor Jones*, 4 id. 207 (1910); *R. v. Jesshope*, 5 id. 1 (1910); *R. v. Loake*, id. 71 (1911); *R. v. Philpot*, ib. 140 (1912); *R. v. FitzGibbons*, ib. 264 (1912).

In one case of alleged insanity the Lord Chief Justice promised that he would himself communicate to the Home Secretary his opinion upon the circumstances put forward on the appellant's behalf (*n*).

In another case, where the appellant had been guilty of a murder and attempted suicide, the Court refused to interfere, because the evidence did not show insanity within the rules of *McNaghten's Case*; but they recommended the prisoner to the Home Secretary for mercy, on the ground that—

“The deceased woman boasted she had driven the man *dotty* by her treatment of him in throwing him over, and upon her refusal to go away with him he had taken very little food, perhaps had too much drink, and been under great mental agitation for some considerable time” (*o*).

Where the crime is not of capital gravity, there is, no doubt, less chance of interference by the Crown with the verdict of a jury convicting the prisoner; but on the other hand there is less hardship suffered, even on the supposition that the verdict might be founded on a mistaken view as to the prisoner's state of mind.

So, in a case where a man, convicted of stealing a pair of boots from outside a shop, was sentenced to eighteen months' imprisonment with hard labour, and appealed against the sentence on the ground (among other things) that he was weak-minded, and ought to be put away “in some criminal home,” the Court refused to interfere, observing:—

“We know quite well that the conditions of imprisonment with hard labour are such that a man is well looked after. It would most likely do him no good to reduce the term passed upon him” (*p*).

It has been suggested, perhaps somewhat ingeniously, that there are two presumptions which every mad prisoner has to encounter and demolish, one after the other, in order to win his way from the prison cell to the lunatic asylum: first, the presumption that a man is sane until proved of unsound mind; and secondly, that “everybody, even one proved to be insane, is presumed to be responsible; in other words, even the raving lunatic is presumed to come up to the law's standard of responsibility, *i.e.*, to be able to distinguish right from wrong” (*q*).

(*n*) *R. v. Lumb*, 7 Cr. A. R. 263 (1912).

(*o*) *R. v. Smith*, 5 Cr. A. R. 123 (1910).

(*p*) *R. v. Buggs*, 6 Cr. A. R. 74 (1910).

(*q*) Oppenh., p. 251; cf. Merc. (Allbutt), 871.

Of the two supposed presumptions in question, only the latter exists in reality. The law presumes, not sanity in the medical sense, but only sanity or responsibility in the legal sense, viz., capacity to distinguish between good and evil. Where, however, a man is proved to be possessed of no sense at all, it would be absurd to say that he is bound by a presumption to the effect that he was possessed of sufficient sense to know right from wrong; and the law excuses a gibbering idiot, not because he gibbers, but because his gibbering denotes a lack of capacity to conduct himself in accordance with settled rules of conduct.

The presumption of "sanity," which is certainly as well established as any rule followed by our Courts (*r*), has been nowhere propounded more emphatically than in the words of Rolfe, B. :—

"If the prisoner seeks to excuse himself on the plea of insanity, it is for him to make it clear that he was insane at the time of committing the offence charged. The *onus* rests on him, and the jury must be satisfied that he actually was insane. If the matter be left in doubt, it will be their duty to convict him; for every man must be presumed to be responsible for his acts till the contrary is clearly shown" (*s*).

Here, insanity is spoken of as synonymous with irresponsibility; and the sense in which the word is used clearly brings out the fact that there is in reality one presumption only, whereby merely such intelligence is attributed to the prisoner as would enable him to understand the law in its application to his conduct.

The medical and other evidence in support of the so-called plea of "insanity" should be directed exclusively to disproving the prisoner's capacity to appreciate the nature, quality or legal character of his act. Evidence of "raving," of hallucinations and the like, is not essential to such a defence, and is indeed material only so far as it may tend to rebut (as it usually will do) the legal presumption as to the existence of such capacity.

In short, when it is said that "every person is presumed to be sane, and to be responsible for his acts" (*t*), the meaning is that every person is presumed to be sane *in the sense of* being responsible for his acts.

(*r*) Hale, I., 33; *R. v. Oxford*, *ub. sup.*; St. Dig., art. 29.

(*s*) *R. v. Stokes*, 3 C. & K. 185 (1848).

(*t*) St. Dig., art. 29; cf. *R. v. Coelho*, 30 T. L. R. 535 (1914).

A more substantial difficulty (*u*) arises out of certain old statements of the law with reference to temporary insanity (*x*).

Earl Ferrers, upon his trial for murder (*y*), was proved to have been sometimes insane, in the legal sense of not knowing what he did, and not judging the consequences of his actions. The murder was, however, committed after some deliberation, and was prompted by a motive of enmity; and it was alleged that at the time of the act the prisoner had sufficient capacity to be legally responsible. The Solicitor-General urged against him a passage from *Hale* (*z*):—

“Such persons as have their lucid intervals . . . in such intervals have usually at least a competent use of reason, and crimes committed by them in these intervals are of the same nature and subject to the same punishment as if they had no such deficiency.”

The earl was found guilty and executed.

The same law was laid down in *Bellingham's Case* (*a*); but in *R. v. Hadfield*, where the prisoner, who had long been insane, but had temporary alleviations of his malady, after suffering under the most absurd delusions on all sorts of subjects throughout the day of the crime, went in the evening to a theatre and fired a pistol at King George III., Kenyon, C.J., laid down the rule as to lucid intervals in a more reasonable manner:—

“The material part of this case is, whether at the very time when the act was committed, this man's mind was sane. I confess the facts proved by the witnesses . . . bring home conviction to one's mind, that at the time he committed this offence, and a most horrid one it was, he was in a deranged state. I do not know that one can run the case very nicely; if you do run it very nicely, to be sure, it is an acquittal. His sanity must be made out to the satisfaction of a moral man, meeting the case with fortitude of mind, knowing he has an arduous duty to discharge, yet if the scales be anything like even, throwing in a certain proportion of mercy to the party.”

The prisoner was acquitted on the ground of insanity (*b*).

The law governing the rare case of a man *qui gaudet lucidis intervallis*

(*u*) Vide *Oppenh.*, pp. 257-9.

(*x*) *R. v. Collins*, 6 Cr. A. R. 193 (1911).

(*y*) 19 St. Tr. 885 (1760).

(*z*) *Hale*, I., 31; *sed vide Hale*, I., 33 (*infra*).

(*a*) *Collinson*, Add. 636 (1812), per *Mansfield*, C.J.

(*b*) *R. v. Hadfield*, 27 St. Tr. 1281 (1800) (*vide comment*, *Tuke*, I., 301).

is perhaps not so unjust as it looks. It must be remembered that before the presumption can be applied in any case it must be shown clearly that the patient has enjoyed lucid intervals in the proper sense of the term. There can be no doubt that such a phenomenon was, in earlier times, thought to be of frequent occurrence; but on such a point the Courts must necessarily be open to instruction by enlightened medical opinion, and it may well be doubted whether, in view of the great development of medical science in modern times, the presumption as to a crime being committed during a lucid interval can now have any practical application whatever.

A lucid interval, in order to bring the case within the presumption referred to, must do something more than satisfy the definition of "an interval between paroxysms of insanity, during which the mind appears clear, and the patient is apparently capable of conducting himself sanely" (c).

The evidence necessary to support a presumption arising out of the enjoyment of lucid intervals must at least satisfy the standard set up, in a civil case, by Lord Thurlow, L.C. :—

"The evidence in support of the allegation of a lucid interval, after derangement at any period has been established, should be as strong and demonstrative of such fact as where the object of the proof is to establish derangement. . . . By a perfect interval, I do not mean a cooler moment, an abatement of pain or violence, or of a higher state of torture, a mind relieved from excessive pressure; but an interval in which the mind, having thrown off the disease, had recovered its general habit" (d).

In default of convincing proof of a completely lucid interval in the true sense, there can hardly be room for doubt as to the applicability of the recognised presumption of the continuance of that state of things which is proved to have once existed (e).

In other words, "where any derangement or imbecility is proved or admitted to have existed at any particular period, it is presumed to continue till disproved" (f).

This view is well expressed by Lord Nottingham, L.C., in a note to Coke upon Littleton :—

(c) Tuke, 752.

(d) *A.-G. v. Parnter*, 3 Bro. C. C. 234 (1792).

(e) Vide *R. v. Jones*, 11 Q. B. D. 118 (1883).

(f) Taylor, Ev., par. 197, n.; cf. Best, Ev., par. 405 (p. 389).

"Among those who have lucid intervals, it may be fit to distinguish between those who have only *remissionem seu adumbratam quietam* and those who have *intermissionem seu resipiscentiam integram*. . . . *Semel furibundus, semper furibundus praesumitur*; and therefore where the question is of a fact done *lucido intervallo*, which may be either by remission or intermission, it is not enough to show the act was *actus sapienti conveniens*, for that may happen many ways, but it must be proved to be *actus sapientis*, and to proceed from judgment and deliberation; else the presumption continues" (g).

And, even in a case where a patient has been shown by medical evidence to have enjoyed perfectly lucid intervals, or periods of complete sanity (h), we have the respectable authority of Lord Hale for the rule that the presumption as to sanity at the time of the act charged must be applied with the utmost caution:—

"Again, if a man be a lunatick, and have his *lucida intervalla*, and this be sufficiently proved, yet the law presumes the acts or offences of such a person to be committed in those intervals, wherein he hath the use of reason, unless by circumstances or evidences it appears that they were committed in the time of his distemper.

"And although in civil cases, he that goes out to allege an act done in time of lunacy must strictly prove it so done, yet in criminal cases (where the Court is to be thus far of counsel with the prisoner as to assist him in matters of law and the true stating of the facts) if a lunatick be indicted of a capital crime, and this appears to the Court, the witnesses to prove the fact may and must also be examined, whether the prisoner were under actual lunacy at the time of the offence committed" (i).

The Trial of Lunatics Act, 1883 (k), provides that where, in any indictment or information, any act or omission is charged against any person as an offence, and it is given in evidence, on the trial of such person for that offence, that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done, or omission made, then, if it appears to the jury before whom such person is tried that he did the act or made the omission charged, but was insane as

(g) Co. Litt. 246 b., note (1).

(h) Tayl., Man., 731-2.

(i) Hale, I., 33.

(k) 46 & 47 Vict. c. 38, s. 2 (superseding the provisions of the Trial of Lunatics Act, 1800, except sect. 2 thereof, *infra*).

aforesaid, at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission.

Where such special verdict is found, the Act directs that the Court shall order the accused to be kept in custody as a criminal lunatic during His Majesty's pleasure (*l*).

It is the duty of the judge, in directing the jury where insanity has been alleged, explicitly to inform them of their power to return the special statutory verdict (*m*).

It is sufficient, however, if he directs them clearly that the issue is whether the prisoner is sane or insane (*n*); and, if there has been a sufficient and proper direction to the jury on the principles which should guide them upon the question of insanity, their verdict will not be interfered with merely on the ground that the judge took a view against the suggestion of insanity on the prisoner's behalf (*o*).

The statutory verdict can of course only be found by a petty jury, and, even under the former Act (*p*), which prescribed an acquittal on the ground of insanity, it was not competent to a grand jury to throw out a bill on the ground of an accused person's unsoundness of mind, however obvious the fact of his insanity might be (*q*).

The special verdict of guilty but insane must be found in unequivocal language; and the Court has refused to treat as equivalent thereto a verdict of guilty "with the strongest possible recommendation to mercy, and we consider she was in a frenzied state of mind" (*r*).

By sect. 5 (4) of the Criminal Appeal Act, 1907 (*s*), it is provided that:—

"If on any appeal it appears to the Court of Criminal Appeal that, although the defendant was guilty of the act or omission charged against him, he was insane at the time the act was done or omission made, so as

(*l*) Vide Tuke, I., 295.

(*m*) *R. v. Smith*, 5 Cr. A. R. 123 (1910), per Darling, J., at p. 130.

(*n*) *R. v. Coleman*, 7 id. 65 (1911).

(*o*) *R. v. Marland*, ib. 77 (1911).

(*p*) 39 & 40 Geo. 3, c. 94.

(*q*) *R. v. Hodges*, 8 C. & P. 195 (1838).

(*r*) *R. v. Harding*, 1 Cr. A. R. 219 (1908).

(*s*) 7 Edw. 7, c. 23.

not to be responsible according to law for his actions, the Court may quash the sentence passed at the trial, and order the appellant to be kept in custody as a criminal lunatic under the Trial of Lunatics Act, 1883, in the same manner as if a special verdict had been found by the jury under that Act."

The first occasion upon which this power was exercised was on an appeal by a madman convicted at the Leeds Assizes, 1908, of murder. The prisoner had been found by a man named Helliwell on the highway cutting off a woman's head with a table knife. Helliwell went for assistance, and shortly afterwards the prisoner was found in an adjoining field, cutting off the woman's arm. He refused to desist until threatened with a crowbar, and insisted on taking with him the woman's umbrella, hat and corsets, worth altogether about sixpence. There were twenty-eight knife-wounds on the woman's body.

The defence of insanity was set up, and three medical men gave evidence. The opinion of one was that the prisoner, at the time of the offence charged, was insane, but knew that he was killing a woman. He did not think that the prisoner knew he was doing wrong. The two prison doctors, on the other hand, were of opinion that the prisoner knew he was doing wrong, but did not know how wrong the thing was, and did not know or appreciate the quality of the act. All three doctors concurred that the prisoner suffered from hallucinations and delusions. Bigham, J., at the conclusion of his summing-up, directed the jury that the defence must prove that the prisoner did not know he was doing wrong at the time he committed the act.

The judgment upon appeal was delivered by Lawrance, J., who said :—

"In the opinion of the Court, this verdict was unsatisfactory, and ought not to stand. The Court has read the evidence of the doctors. There was very strong evidence before the jury that this man, at the time he committed the offence, was not in a state of mind to make him responsible for his actions. No question has arisen here as to the direction in the summing-up of the learned judge. In the opinion of the Court, the verdict of the jury ought to have been that the appellant was insane at the time he committed this act" (t).

This case has been rather absurdly misdescribed as one in which "the verdict wrung from an unwilling jury was set aside without refer-

(t) *R. v. Jefferson*, 1 Cr. A. R. 95 (1908).

ence to the principle of a knowledge of right and wrong, as a test of responsibility" (u).

The Court will refuse to entertain an appeal, on the ground of alleged insanity, which might have, but has not, been raised at the trial (x); or which has been suggested and properly dealt with at the trial (y), even if there may have been some evidence available in addition to that unsuccessfully placed before the jury (z); or even if there be fresh evidence, e.g., as to the prisoner's family history, which was not available at the trial, and would be proper for examination by the Home Secretary (a).

Where the defendant, after deliberately refusing to raise the defence of insanity at the trial, not only had sufficient temerity to apply for leave to appeal against sentence, on the ground that his having been confined in a lunatic asylum ought to have been taken into consideration, but also persisted in his appeal after repeated warnings, the Court increased his sentence, in order that he might be "carefully watched and carefully treated" for a longer time (b).

On the other hand, where insanity has been set up as the sole defence at the trial, and has been rejected by the jury, the Court will not entertain on appeal an utterly different defence put forward as reducing the prisoner's guilt from that of murder to that of manslaughter (c). The principle on which the Court acts in such cases is that an appeal must not be made on lines entirely different from those followed by the defence at the trial (d).

Whether the special statutory verdict of "guilty but insane" could be appealed from was, until a recent decision in the House of Lords, considered to be a question of much subtlety.

In *R. v. Ireland* (e), now overruled (f), it was held by the Court of

(u) Nicolson (Allbutt), p. 1040.

(x) *R. v. De Vere*, 2 Cr. A. R. 19 (1909).

(y) *R. v. Collins*, 6 id. 193 (1911).

(z) *R. v. Atherley*, 3 id. 165 (1909); cf. *R. v. Jones*, 4 id. 207 (1910).

(a) *R. v. Jesshope*, 5 id. 1 (1910); *R. v. Loake*, 7 id. 71 (1911); *R. v. Lumb*, ib. 263 (1912).

(b) *R. v. Simpson*, 5 id. 217 (1910).

(c) *R. v. Philpot*, 7 Cr. A. R. 140 (1912).

(d) *R. v. Carroll*, 4 Cr. A. R. 146 (1910).

(e) 4 Cr. A. R. 74 (1910).

(f) Vide *Felstead v. Director of Public Prosecutions*, *infra*.

Criminal Appeal that there might be such an appeal (g), chiefly on the following grounds :—

“ If we look back to the origin of trial by jury, a special verdict was the ordinary verdict ; it was always the right of a jury to return a special verdict if no statute forbade them to. This Act (h) says they *shall* do so. . . . Now, it is a verdict of guilty, but the person so found is to be treated as a criminal lunatic. Suppose a person against whom a verdict of this kind is given is indicted again on the same charge. What will he plead ? Any other person so charged would plead *autrefois convict* or *autrefois acquit*. Could this man plead *autrefois convict* ? If not, he might perhaps be tried again, and a different verdict might be given. It is impossible the law intended to lay him open to such a grave disadvantage. . . . These are the words in the Criminal Appeal Act : *A person convicted may appeal*. . . . It is obvious that these words, *convicted*, *conviction*, are neither of them words of precise meaning. . . . The special verdict and the order made thereon amount to a conviction ” (i).

But there is an obvious fallacy in the argument that a prisoner against whom the statutory verdict has been found might plead *autrefois convict*. The statute expressly defines the special verdict as being to the effect that the accused was *insane as aforesaid*, i.e. “ so as not to be responsible according to law for his actions at the time when the act was done or omission made,” and it clearly follows that the correct plea must be *autrefois acquit* (k).

A similar fallacy underlies the observations of Dr. H. Oppenheimer upon the Act of 1883, in which he endeavours to establish the proposition that “ lunatics are made responsible by the very terms of the statute,” and rather fancifully describes the judicial order of detention as a “ statutory sentence,” and the detention itself as a “ punishment ” (l).

The unsatisfactory decision in *R. v. Ireland* was followed by an equally unsatisfactory judgment in *R. v. Machardy* (m), where the Court held that a special statutory verdict was divisible into two parts, and that

(g) Under sect. 3 of the Court of Criminal Appeal Act, 1907.

(h) The Trial of Lunatics Act, 1883, *supra*.

(i) Per Darling, J.

(k) Vide *R. v. Hill*, 7 Cr. A. R. 26, 83 (1911).

(l) Oppenh., pp. 19—20.

(m) 6 Cr. A. R. 272 (1911).

no appeal could be brought upon *that part* of it which found the defendant to have been insane.

The law on this subject has, however, now been settled by the House of Lords in *Felstead v. Director of Public Prosecutions* (*n*), in which *R. v. Ireland* and *R. v. Machardy* were both reconsidered, and it was held that the statutory verdict is "one and indivisible," and amounts to an acquittal, so that no appeal can lie from it, or from any part of it.

With regard to procedure at the trial, it has been held not proper for the Crown to call evidence of the prisoner's insanity, but proper that any evidence in the possession of the Crown should be placed at the disposal of the prisoner's counsel; and in the same case it was held that no general rule can be laid down as to the duty of the Crown with regard to the tendering of evidence, at any particular point of the trial, rebutting the defence of insanity; or as to counsel for the Crown asking for a ruling whether or not there is evidence of insanity to go to the jury; the only general rule to be applied is that insanity, if relied upon as a defence, must be established by the defendant (*o*).

In trials for murder, and sometimes in other cases, where there is a suggestion that the person charged is insane, it is usual for the prosecution to consult with the medical officer of the gaol, or some other independent medical man. When his report shows a probability of insanity, it is the practice to hand a copy thereof to defending counsel. But when the medical report is adverse to the prisoner, there is no obligation to give a copy to counsel for the defence, although a copy would not be likely to be refused if asked for; and it is no objection to its admissibility in evidence, that a copy was not furnished to the prisoner (*p*).

An important rule of procedure at common law was to the effect that no criminal trial could proceed before a *non compos mentis* (*q*).

It is now provided by statute that if any person, indicted for any offence, shall be insane, and shall upon arraignment be found so to be by a jury lawfully empanelled for that purpose, so that such person cannot be tried upon such indictment, it shall be lawful for the Court

(*n*) 30 T. L. R. 469 (1914), per Lord Reading, L.C.J.

(*o*) *R. v. Smith*, 6 Cr. A. R. 19 (1910).

(*p*) *R. v. Abramovitch*, 7 Cr. A. R. 145 (1912).

(*q*) Hale, I., 34-5.

to record such finding and order such person to be kept in strict custody until His Majesty's pleasure shall be known (r).

The points into which a jury should inquire in such a case are, not as to the prisoner's general capacity of communicating on ordinary matters, but, first, whether he is mute of malice or not ; secondly, whether he can plead to the indictment or not ; and thirdly, whether he is of sufficient intellect to comprehend the course of proceeding on the trial, so as to make a proper defence (s).

Where a deaf and dumb person was found so to be " by visitation of God," but a witness was then found able to communicate with the prisoner by signs, the prisoner was arraigned, tried, and convicted (t).

A deaf and dumb person who was unable to read or write, having been arraigned, was found by the jury to be mute by visitation of God. They further found that, by reason of his inability to communicate with, or receive communications from, others, he was incapable of pleading to the indictment, or taking his trial thereon, and of understanding and following the proceedings. This finding was held to be one of insanity, under the Act (u).

In accordance with the presumption of sanity, the *onus* of proving the prisoner's incapacity to plead lies upon the party alleging it ; and it is not for the prosecution to prove his sanity or fitness to plead (x).

The verdict, upon the inquiry as to fitness to plead or be tried, may be found merely upon the prisoner's conduct and demeanour in Court (y), or upon evidence called as to his state of mind ; and the prisoner may, if he choose, call witnesses to testify (or offer his own testimony, if possessed of a sufficient sense of humour), as to his own sanity, against the contention of his own counsel (z).

Where a prisoner, after being allowed to plead, is in the course of his trial alleged to be there and then insane, and unable to follow the proceedings, the judge in his discretion may discharge the jury, recom-

(r) Trial of Lunatics Act, 1800 (39 & 40 Geo. 3, c. 94), s. 2.

(s) *R. v. Pritchard*, 7 C. & P. 303 (1836).

(t) *R. v. Jones*, 1 Leach, 102 (1773).

(u) *R. v. Governor of Stafford Prison, ex parte Emery*, 1909, 2 K. B. 81, following *R. v. Steel*, 1 Leach, 451 (1787), *R. v. Dyson*, 7 C. & P. 305, n. (1831), and *R. v. Berry*, 1 Q. B. D. 447 (1876).

(x) *R. v. Turton*, 6 Cox, 385 (1854), overruling *R. v. Davies*, ib. 326 (1853).

(y) *R. v. Goode*, 7 A. & E. 536 (1837).

(z) *R. v. Pearce*, 9 C. & P. 667 (1840).

mitting the prisoner to await the recovery of his understanding (a), or may proceed with the trial, and leave the jury to convict, acquit or return the statutory verdict on the merits of the case, or to find as to the prisoner's fitness to follow the proceedings (b).

There is no appeal from the verdict of a jury finding a prisoner insane and unable to plead. Upon an application made in such a case Pickford, J., said :—

“ He was never tried on the indictment at all ; no evidence of fact was offered ; and indeed the finding was that he was not fit to be tried. If His Majesty is at any time advised that the man has sufficiently recovered so as to be fit to plead, he may then be brought up and tried upon the indictment. As the matter stands, there has been no trial, and no conviction, and the case is not within the Act ” (c).

Nor is there any appeal against the finding of a jury in the contrary sense—viz., that the prisoner is fit to plead and take his trial (d).

This being so, a curious dilemma faced the judge upon the indictment of one Tebbitt (at the Old Bailey Sessions in April, 1912) for shooting at Mr. Leopold de Rothschild, and at a police officer, with intent to murder. The prisoner being obviously insane, a jury was empanelled upon his arraignment ; but notwithstanding the evidence they found him fit to plead. He thereupon, without consulting his counsel, promptly pleaded guilty to both indictments. Coleridge, J., said that—

“ Personally,—and everyone who had listened to the case must take the same view—he was of opinion that the prisoner was not responsible for his action, and therefore no moral blame could possibly attach to his conduct. Personally, his Lordship was placed in the difficulty of having to consider the prisoner as a sane man, responsible for his act, and to pass the same sentence on him as he should pass had he been actually a sane man, responsible for having attempted, wilfully and with malice aforethought, to murder two, if not three, people. Had the prisoner been sane, the sentence would have been twenty years' penal servitude, and that was the sentence he should pass now. At the same time, it was more or less of a formality, because he was satisfied, and the prisoner might be satisfied, that that sentence would not be carried into effect. The state of the prisoner's mind being inquired into, the result, in fact, would be that he would be detained during His Majesty's pleasure ” (e).

(a) *Bac. Abr. Idiot* (B) ; *Hale*, I., 35-6.

(b) *R. v. Southey*, 4 F. & F. 864 (1865).

(c) *R. v. Larkins*, 6 Cr. A. R. 194 (1911).

(d) *R. v. Jefferson*, 1 Cr. A. R. 95 (1908), *vide supra*.

(e) *R. v. Tebbitt*, Centr. Crim. Ct., April Sessions, 1912, as reported in the *Daily Telegraph*.

Six successive stages have been enumerated, at any of which "a criminal offender may be officially recognised as insane, and placed under detention as a criminal lunatic"—viz., first, when awaiting trial; secondly, on arraignment; thirdly, upon a verdict returned under the Act of 1883; fourthly, between verdict and judgment; fifthly, under a reprieve; and sixthly, while undergoing penal servitude or imprisonment (*f*).

If, after conviction of a capital crime, a prisoner becomes insane, he cannot be hanged until his recovery, because "he may have some plea which, if sane, he could urge in stay of execution" (*g*).

Whatever, then, may be said or thought as to the supposed stringency of English law with reference to the admission of the excuse of mental irresponsibility, it can never be suggested that our criminal procedure falls short of extraordinary generosity in affording opportunities for the raising of that plea.

It must further be observed that now, in the case of *summary* proceedings against a "defective," the Court may, where the charge is proved, direct a petition to be presented, or even make an order, that the defective be dealt with as such, without proceeding to a conviction; this being the only class of cases where insanity alone (without amounting to, or being accompanied by, inability to appreciate the law) may confer an immunity from conviction of crime (*h*).

In conclusion, upon the subject of insanity as affecting the perpetration of crime, it may be observed that persons present, assisting a madman in violent resistance to officers, may, if his acts prove fatal to life, be convicted of murder, as principals in the first degree, without proof of any motive or ulterior purpose having been entertained either by him or by them; provided, however, that there be sufficient proof of common purpose, according to the ordinary doctrine. Such persons cannot be convicted of feloniously aiding and abetting the madman; because, for the purpose of such a conviction, the principal offender must be proved to be a person capable of committing the crime (*i*).

(*f*) Nicolson (Allbutt), p. 1037.

(*g*) Hale, I., 34; Kenny, Outl., p. 59, n.

(*h*) Mental Deficiency Act, 1913, proviso to sect. 8 (1).

(*i*) *R. v. Tyler and Price*, 8 C. & P. 616 (1838).

CHAPTER VI.

DRUNKENNESS.

THE grounds of exemption from criminal liability which have already been examined are such as deprive the person excused of any capacity to form a culpable intention.

A man acting under a misconception of material facts is thereby excused because, through no fault of his own, he fails to recognise the fact as falling under the law. One of the premisses upon which he acts, in judging the nature of his conduct, being altogether false, he cannot rightly perform that syllogism which is necessary to the conceiving of a culpable intention.

A person ignorant of the rule of law which should govern his conduct is placed in a very similar predicament. Here, the other premiss of the syllogism is false; and if *ignorantia juris* were allowed as an excuse under our law, it would be grounded on that defect.

Infancy or insanity may affect the syllogism by a false premiss upon the facts—viz., as to the nature or quality of the act; or by a false premiss concerning the law—viz., that the act is not criminal; or even by absolute incapacity in the person's mind to apprehend correctly either of the premisses, or to perform effectively any part of the mental process which should lead to a logical deduction.

We have now to consider a form of excuse arising out of a less radical incapacity; and we shall find that, as the influence of this incapacity upon conduct is merely partial, besides being more or less avoidable by the party, it has been only sparingly allowed as a plea against conviction of crime.

Drunkenness does not often entirely disable the mind from forming a culpable intention. Neither of the essential premisses is, in the ordinary case of drunkenness, either entirely false or totally lacking; but the syllogism is, under the influence of intoxication, performed in a more or less imperfect and hazy manner. Something resembling the correct

logical deduction is arrived at ; but the degree of likeness is variable, according to all the degrees and stages of inebriety, from the first sign of frivolity to the last condition of torpor (a).

It is therefore a cardinal error to suppose that drunkenness is a species of insanity : *dementia affectata*, or "voluntarily contracted madness," as it has been called (b).

"Drunkenness is not insanity, nor does it answer to what is termed an unsound mind, unless the derangement which it causes becomes fixed and continued, by the drunkenness being habitual, and thereby rendering the party incapable of distinguishing between right and wrong" (c).

In other words, habitual indulgence in drink may induce the peculiar mental condition of a "fixed phrenzy" (d) or dipsomania, which, if not identical with actual madness as a disease, at any rate has similar effects upon the patient's capacity to understand the law as applied to his conduct. Such a condition is quite distinct from that of ordinary drunkenness, as well with regard to its symptoms and consequences as in respect of the remoteness of its causation (e).

A prisoner, tried before Stephen, J., for the murder of his sister-in-law, was found by a medical man to be suffering from *delirium tremens*, resulting from alcoholic indulgence. He was disordered in his senses, and unable to distinguish between right and wrong at the time he committed the act. Under proper treatment he recovered in a week, becoming perfectly sensible. Stephen, J., directed the jury as follows :—

"If this man had been raging drunk, and had stabbed his sister-in-law and killed her, he would have stood at the bar guilty of murder beyond all doubt or question. But drunkenness is one thing, and the diseases to which drunkenness leads are different things ; and if a man by drunkenness brings on a state of disease, which causes such a degree of madness, even for a time, as would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible. In my opinion, in such a case, the man is a madman, and is to be treated as such, although his madness is only temporary."

The learned judge then explained the test of insanity, as laid down in

(a) Cf. Ray, Chap. 26 ; pars. 542-4.

(b) Hale, I., 32 ; Co. Litt. 247 a.

(c) *R. v. Rennie*, 1 Lew. 76 (1825), per Holroyd, J. ; cf. *R. v. Baines*, Renton, 912 (1886), per Day, J., *contra*.

(d) Hale, *ub. sup.* ; cf. Barnett, pp. 18—20, 59—64.

(e) Vide Ray, Chap. 26, pars. 545 et seq.

McNaghten's Case, as being applicable to *delirium tremens*, which "was not the primary, but the secondary cause of drinking"; and he directed the jury, if they thought there was a "distinct disease, caused by drinking, but differing from drunkenness," and obliterating the knowledge of good and evil, to bring in the statutory verdict as in a case of ordinary insanity. This they did (*f*).

The first distinction to be drawn is, then, between Hale's "*habitual* or fixed phrenzy" and "*simplex* phrenzy occasioned *immediately* by drunkenness": between Stephen, J.'s "distinct disease caused by drinking" on the one hand, and mere drunkenness of any kind or degree, unaccompanied by mental disease, on the other (*g*).

Another distinction is the obvious one between drunkenness attributable to the fault of the party, and intoxication for which he is shown to have been in nowise to blame.

"If a person by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causeth such a temporary or permanent phrenzy, as aconitum, or nux vomica, this puts him into the same condition, in reference to crimes, as any other phrenzy, and equally excuseth him" (*h*).

Curious psychological results may be obtained by the use of certain drugs, such as opium, Indian hemp, belladonna, chlorodyne, and alcohol. For instance, it is said that "in belladonna poisoning the delirium is . . . often an every-day, busy delirium; the patient sets about doing what he is habitually accustomed to do, only he does it at the wrong time" (*i*).

Although the example given by Hale is that of the administration of drugs, it follows from his argument that if anybody is charged with a crime committed by him under the influence of alcohol, even in the form of ordinary wine or spirits, and can prove satisfactorily that this was administered to him by force or fraud, or in such circumstances that he was in no degree blamable for taking it, he will be altogether absolved in law from the consequences of his misfortune.

In such cases, the party administering the alcohol or other drug may

(*f*) *R. v. Davis*, 14 Cox, 563 (1881).

(*g*) Vide Ray, Chap. 27.

(*h*) Hale, I., 32.

(*i*) Poore, 414.

well be criminally liable for the consequences, if they were foreseen or expected by him.

The person drugged or intoxicated would be excused under the principle of compulsion, or absence of volition, and the party administering the drug or stimulant would be guilty (if at all) on the ground that the conduct appearing to be that of the innocent person was in reality that of the person taking advantage of his helplessness to control his behaviour (*k*).

It has even been once or twice judicially suggested that the excuse of involuntary drunkenness may be available in the case of a man who, being in a diseased or weakened condition of body or mind, is, so to speak, predisposed thereby to intoxication, and becomes drunk by surprise :—

“ If a person from any cause—say long watching, want of sleep or depravation of blood—was reduced to such a condition that a smaller quantity of stimulant would make him drunk than would produce such a state if he were in health, then neither law nor common sense could hold him responsible for his acts, inasmuch as they were not voluntary but produced by disease ” (*l*).

Somewhat similar to the case here suggested is the predicament of persons who, having sustained some injury to the head, are thereby rendered incapable of *carrying their liquor*, even in small quantities, with a normal degree of circumspection, and in whose case even slight drunkenness “ produces sometimes a fit of temporary insanity, leaving the mind clear when the drunken fit is over ” (*m*).

Hard cases make bad law ; and it would seem disastrous to admit an exceptional excusability for such reasons as these.

At any rate, it seems obvious that persons afflicted with a constitutional weakness of the kind suggested ought, in view of their peculiar misfortune, to be uncommonly careful in the indulgence of their bibative appetites.

The question remaining to be examined is, then, whether any excuse,

(*k*) *Vide post*, Chap. X., “ Innocent Agency.”

(*l*) *Per Pales, C.B., R. v. Mary R.*, cit. Kerr, 688-9 ; Renton, 912-3 (1887) ; cf. *R. v. Baines and R. v. Mountain*, per Day, J., and Pollock, B., *ib.* (1886-8).

(*m*) Tayl., Princ., 900.

and, if so, what degree of excuse, is attached by law to the circumstance of ordinary drunkenness, *i.e.*, the condition of a sane man who has for the time being placed himself, or allowed himself to be placed, under the influence of drink.

The general rule is that drunkenness in this sense affords no excuse whatever for crime.

“A drunkard, who is *voluntarius dæmon*, hath no privilege thereby but what hurt or ill soever he doth his drunkenness doth aggravate it, *nam crimen ebrietas et incendit et detegit*” (n).

The rule as thus absolutely stated, though obviously reasonable, is not enforced in all its primitive rigour. It must be read as subject to three exceptions, each of which is of considerable importance, though confined in operation to a particular class of cases.

First, where an act of violence, with which a prisoner is charged, has ensued upon some provocation or aggression of such a kind that, if sufficient in point of degree, it would suffice to relieve or modify his responsibility for the act in question, the fact that he was drunk may be taken into consideration by the jury; so that circumstances which would have given rise neither to a valid excuse of self-defence nor to a successful plea of provocation in the case of a sober man, may avail in defence of a drunken man to justify his act, or (in the case of homicide) to reduce the crime from murder to manslaughter (o).

A prisoner was indicted for maliciously stabbing a man with a sword-stick outside a beer-house. After a drunken quarrel with another person, the prisoner walked up and down, flourishing his sword-stick, and saying that if anyone struck him he would make him repent it. Shortly afterwards the prosecutor, being ignorant of what had occurred, struck the prisoner twice with his fist, by way of quieting him, whereupon the prisoner fulfilled his promise. In directing the jury, Parke, B., said :—

“Drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is in such cases whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more

(n) 1 Inst., 247; cf. *R. v. Reeves, Tayl., Princ.*, 899 (1844); *R. v. Williams*, ib. 898 (1886).

(o) Vide *post*, Chap. XII.

easily excitable in a person when in a state of intoxication than when he is sober. So, where the question is whether words have been uttered with a deliberate purpose, or are merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered. But if there is really a previous determination to resent a slight affront in a barbarous manner, the state of drunkenness in which the prisoner was ought not to be regarded, for it would furnish no excuse " (p).

But further, where there has been no actual provocation of, or act of aggression against, the prisoner in point of fact, and even where nothing of the sort was intended, but the act of violence charged against him was induced by such a *bonâ fide* mistake of fact as would have excused a sober man, the fact that he was drunk at the time, and that the mistake was partly due to his intoxicated condition, does not disentitle him to set up that defence.

On an indictment for stabbing, Park, J., told the jury that they might take into their consideration, among other circumstances, the fact of the prisoner being drunk at the time, in order to determine whether he acted under a *bonâ fide* apprehension that his person or property was about to be attacked (q).

So, where a charge of assault arose out of an affray in which all the parties were drunk, and there seemed some ground for supposing that the prisoner acted under apprehension of an assault upon himself, Crowder, J., directed the jury as follows :—

"Drunkenness is no excuse for crime ; but in considering whether the prisoner apprehended an assault on himself, you may take into account the state in which he was " (r).

This excuse of drunken mistake appears, however, to be narrowly confined to the pleas of self-defence and provocation, upon indictments for homicide or for crimes of violence against the person.

No sufficient authority can be found for the suggestion (s) that the general excuse of *ignorantia facti* is available for the purpose of disproving *mens rea* where the ignorance or mistake is directly caused by, or mainly attributable to, the defendant's voluntary drunkenness.

(p) *R. v. Thomas*, 7 C. & P. 817 (1837).

(q) *R. v. Marshall*, 1 Lew. 76, and *Goodier's Case*, ib. (1830 and 1831) ; cf. *R. v. Patteson*, Tayl., Princ., 900 (1840).

(r) *R. v. Gamlen*, 1 F. & F. 90 (1858).

(s) Kenny, Outl., 61.

Such a doctrine would constitute a serious departure from the general rule that ignorance of fact can be pleaded only where the defendant has used all due diligence (*t*). To get drunk, and become fuddled, is not the act of a diligent man.

Even in its application to the pleas of self-defence and provocation, the circumstance of intoxication avails no further than to supply a higher *degree* of necessity or provocation than could otherwise be gathered from the occasion. It cannot render available, by way of defence, any form or species of provocation, whether real or imagined, which in its very nature would be insufficient to constitute gross provocation to a sober man, *e.g.*, mere words, or suspicious conduct (*u*).

Secondly, as the prisoner's state of mind with regard to prior circumstances, so also his state of mind with regard to the possible consequences of his act, may sometimes be taken into account, and considered from the point of view of his drunken condition.

It has already been noticed, and will be pointed out in some detail in the next chapter, that crimes dependent upon the happening of a particular consequence are, according to the principle of intentionality as applied in our law, divisible into two classes: those where full intent of the consequence is required, and those where some inferior degree of intention, *e.g.*, rashness, is sufficient to constitute guilt.

Crimes of the latter class, *e.g.*, involuntary manslaughter, frequently consist of a complex act characterised by culpable recklessness; and here the fact of drunkenness can form no excuse, because the becoming intoxicated is itself an act of gross recklessness which, *ex hypothesi*, directly conduces to, or rather forms an integral part of, the perpetration of the crime in question. For example, in *R. v. St. John Long* (*x*), a case was cited by counsel where a man was convicted of manslaughter by killing a woman in a drunken attempt to deliver her of a child; and in *R. v. Jones* (*y*), where a man was indicted for manslaughter by negligent driving, and was proved to have been drunk at the time, it was held that he was entitled to no indulgence whatever on that account.

But where, as in the case of murder, or wounding with intent to do

(*t*) Vide Chap. II., *ante*.

(*u*) *R. v. Birchall*, 29 T. L. R. 711 (1913).

(*x*) 4 C. & P. 398, 423 (1830-1), *post*, Chap. VII.

(*y*) 11 Cox, 544 (1870).

grievous bodily harm, it is essential to the commission of the crime charged that a particular consequence should have been fully intended, the fact that the prisoner was under the influence of drink may be taken into consideration in deciding whether he fully intended that consequence; and intention must not, by reason of his drunkenness, be imputed to him in a higher degree than that which he actually entertained.

The chief authority for this exception to the general rule as to drunkenness is *R. v. Cruse* (2), where a man and his wife, both very drunk, cruelly beat a child, causing concussion of the brain, and were indicted for inflicting an injury dangerous to life with intent to murder, that being a capital offence under the statute then in force (a).

Patteson, J., said to the jury :—

“Before you can find the prisoner, Thomas Cruse, guilty of this felony, you must be satisfied that, when he inflicted this violence on the child, he had in his mind a positive intention of murdering that child. Even if he did it under circumstances which would have amounted to murder if death had ensued, that would not be sufficient, unless he actually intended to commit murder. With respect to the wife, it is essential not only that she should have assisted her husband in the commission of the offence, but also that she should have known that it was her husband’s intention to commit murder. It appears that both these persons were drunk; and, although drunkenness is no excuse for any crime whatever, yet it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence.”

Upon this direction the jury found both prisoners guilty of assault only.

It is of importance to note that the word “intention,” as used in this case, and in others where the same doctrine has been laid down, signifies full intent, or such intention as involves full expectation of a particular consequence; it does not refer to, or include, a general intention to break the law, *i.e.*, *mens rea*.

This is probably what is meant by the judges when, as in the passage above quoted, although expressly directing the jury to take into consideration the fact of drunkenness as affecting the question of guilt or

(2) 8 C. & P., 541 (1838).

(a) 1 Vict. c. 85, s. 2.

innocence of the crime charged, they insist that "drunkenness is no excuse for any crime whatever."

A rape is criminal *per se*, and its guilt does not depend upon intention as to consequences. Accordingly, where a prisoner was indicted for that offence, and urged in his defence that he was in liquor, Holroyd, J., told the jury :—

"It is a maxim of law that, if a man gets himself intoxicated, he is liable to the consequences, and is not excusable on account of any crime he may commit when infuriated by liquor" (b).

So, even in the crime of murder, where drunkenness is set up as a defence merely on account of its having caused "sudden heat and impulse," and cannot be shown to have prevented the prisoner from fully intending the fatal consequence, it cannot be allowed as an excuse, because, if it were accepted, "there would be no safety for human life" (c).

In *R. v. Stopford* (d), where it was held that an indictment against a prisoner for wounding a man with intent to do him grievous bodily harm was good, although it was proved that he was on the best of terms with the man struck, and in his drunken fury mistook him for someone else, Brett, J., said :—

"If he did intend to strike the man he saw before him, although he might have considered him to be somebody else, he is guilty. He is also guilty notwithstanding his drunkenness, for unless he was so drunk that he was utterly and consequently incapable of having any intent, and merely struck wildly about, and in so doing struck the prosecutor, he is guilty; mere drunkenness which excites a fearful rage is no excuse."

The circumstances may well be such that the prisoner's drunkenness obviously could not have prevented him from intending the consequence of his act. In such a case, it can form no excuse whatever, and should not be allowed to be taken into consideration.

So, in a recent case where a man had murdered his wife, while under the influence of drink, the Court held that, on account of the deliberate character of the homicide, the jury were properly told that there were no grounds for finding a verdict of manslaughter, and Lord Alverstone, C.J., said :—

(b) *R. v. Burrow*, 1 Lew. 75 (1823).

(c) *R. v. Carrol*, 7 C. & P. 145 (1835), overruling *R. v. Grindley* (1819).

(d) 11 Cox, 643 (1870).

"This poor woman was strangled by a belt tied or held round her neck till she was dead. It was not a case of a belt tied by a drunken man. He knew perfectly well what he had done, and how he had murdered the woman, and in such a case it would be impossible for a judge to allow a jury to find a verdict of manslaughter; for deliberate acts, whether done by a sober or by a drunken man, constitute the crime of murder, and not of manslaughter" (e).

In an older case, where the prisoner was charged with malicious stabbing with a farmer's fork, with intent to murder and with intent to do grievous bodily harm, Alderson, B., said to the jury:—

"The prisoner's being intoxicated does not alter the nature of the offence. If a man chooses to get drunk, it is his own voluntary act. . . . However, with regard to intention, drunkenness may perhaps be adverted to according to the nature of the instrument used. If a man uses a stick, you would not infer a malicious intent so strongly against him, if drunk, when he made an intemperate use of it, as you would if he had used a different kind of weapon; but where a dangerous instrument is used, which if used must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent of the party" (f).

The ruling of Patteson, J., in the leading case (g) was referred to by Coleridge, J., in *R. v. Monkhouse*, where the prisoner was indicted for discharging a loaded pistol at the prosecutor with intent to murder him:—

"Although I agree with the substance of what my brother Patteson is reported to have said, I am not so clear as to the propriety of adopting the very words. If he said that the jury could not find the intent without being satisfied it existed, I shall so lay it down to you; the only difference between us is as to the amount and nature of the proof sufficient to justify you in coming to such a conclusion. . . . Drunkenness is ordinarily neither a defence nor excuse for crime, and where it is available as a partial answer to a charge, it rests on the prisoner to prove it; and it is not enough that he was excited, or rendered more irritable, unless the intoxication was such as to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention" (h).

(e) *R. v. Scholey*, 3 Cr. A. R. 183 (1909).

(f) *R. v. Meakin*, 7 C. & P. 297 (1837).

(g) *R. v. Cruse*, *supra*.

(h) *R. v. Monkhouse*, 4 Cox, 55 (1849).

In another case, the prisoner returned home late at night, in a drunken condition, and on being taunted by his wife he took down a sword, unsheathed it, and struck her with the flat part of it. Her daughter tried to pull her out of the room, but the prisoner pursued her and wounded her with his sword, and she died in a few hours.

Cresswell, J., told the jury :—

“ If the prisoner used the sword wilfully, he was guilty of murder : if the deceased rushed on the sword accidentally, he must be acquitted ; and if the wound was inflicted in a struggle at the door, the prisoner having the sword in his hand, but without any intention on his part to use it, then there was a careless use of the sword, which made him guilty of manslaughter.”

They took the *via media*, and found a verdict of manslaughter (*i*).

Precisely similar considerations as to the degree of intention apply to attempted suicides by intoxicated persons (*k*).

In such a case Wightman, J., laid it down that the question was whether the prisoner had a mind capable of contemplating the act charged, and whether he did in fact intend to take away his life :—

“ The mere fact of drunkenness, in this as in other cases, is not of itself an excuse for crime, but it is a material fact in order to arrive at the conclusion whether or no the prisoner really intended to destroy his life ” (*l*).

The effect of drunkenness on homicidal intention was thoroughly considered by Stephen, J., in a murder trial at the Old Bailey in 1883. The prisoner, being intoxicated, had with some deliberation fetched a pistol and fired two shots at close range, with a fatal result. Stephen, J., said :—

“ If a sober man takes pistols or a knife, and strikes or shoots at someone else, the inference is that he intended to strike or shoot him with the object of doing him grievous bodily harm. If, however, a man acting in that way was drunk, you have to consider the effect of his drunkenness upon his intention. In such cases, a distinction of vital importance occurs, to which it is necessary to point. A drunken man may form an intention to kill another, or to do grievous bodily harm to him, or he may not ; but if he did form that intention, although a drunken inten-

(*i*) *R. v. Moore*, 6 Cox, 137 (1852).

(*k*) *R. v. Mann*, 83 L. J. K. B. 648 (1914).

(*l*) *R. v. Doody*, 6 Cox, 463 (1854), following *R. v. Moore*, 3 C. & K. 319 (1852) ; cf. *R. v. Crisp*, *infra* (1912).

tion, he is just as much guilty of murder as if he had been sober. . . . If you conclude that Doherty took the life of Graham by a pistol shot, fired at him with intent to do grievous bodily harm, he would be guilty of murder, even though he were drunk ; but if his drunkenness prevented his forming such an intention, he would be guilty of manslaughter, and not murder, though such an act in a sober man would prove an intention to do grievous bodily harm. The next point is, as to manslaughter by negligence. . . . To find culpable negligence, in the present case, you must assume that the prisoner went into his bedroom, brought out the loaded revolver, and so handled it as in some manner to fire the two shots without intending to fire at all. If, gentlemen, you convict the prisoner of manslaughter, I must ask you to be good enough to say whether you mean manslaughter by violence wilfully inflicted, or by culpable negligence, for of course it will make a considerable difference in the punishment" (m).

Here, again, the jury took the middle course suggested to them, and found the prisoner guilty of manslaughter with wilful violence.

Where juries have refused to entertain the plea of drunkenness, as negating homicidal intent, it has been found impossible to induce the Court of Criminal Appeal to reverse their decision.

In *R. v. Meade* (n) the appellant was convicted of murdering a woman with whom he lived, the injuries having been inflicted by him when in a state described as "middling drunk," and he having afterwards given a coherent account of what had happened. The homicide was preceded by drunken threats. The appeal was on the ground of misdirection by Coleridge, J., it being urged that by his repeated use of the expression "reason dethroned by drink" he had led the jury to think that the appellant could not be excused unless he was mad with drink at the time, whereas there might (it was argued) be a "less degree of mental derangement" which would reduce murder to manslaughter.

In dismissing the appeal, the Court said :—

"Originally, the law was, that although an insane man was not liable as a sane man was, yet a man suffering from what was called *dementia affectata*, that is, mental disturbance due to voluntary drunkenness, had no excuse, and 'he who is guilty of any crime of any kind whatever through his voluntary drunkenness shall be punished for it as much as if he had been sober' (o). The contrary was first decided in *R. v.*

(m) *R. v. Doherty*, 16 Cox, 306 (1887).

(n) 2 Cr. A. R. 54 (1909).

(o) Hawk. 1 P. C., Chap. 1, s. 6.

Grindley (p) in 1819. Since then, there have been many decisions . . . to the effect that, when intent is of the essence of the crime, that intent may be disproved by showing drunkenness. . . . Everyone is taken to intend the natural consequences of his acts, but this presumption may be rebutted in the case of a sober man, in many ways. It may also be rebutted in the case of a man who is drunk, by showing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous. . . . It was contended at the trial that the intent could not be presumed, because the appellant was incapable, through drunkenness, of having such an intent. . . . By their verdict, the jury must have meant that he was capable of having the intent to injure or kill, and in fact did have such intent " (q).

In *R. v. Crisp* (r) the prisoner was charged with attempted suicide, and was proved to have been in liquor at the time of the act, but not so drunk as not to know what he was doing (s). A verdict of " guilty, but of unconscious mind " was rejected by Darling, J., on the ground that there was no evidence of insanity. The jury explained that they did not intend insanity to be inferred, but that the prisoner was " unconscious of his act at the time." This verdict being also rejected, the jury found a general verdict of guilty, and the prisoner was sentenced to six months' imprisonment. The Court held that the first verdict was not ambiguous, but meant that the prisoner was too drunk to understand his acts, and that it amounted to an acquittal, and must have been accepted, if the jury had insisted, whatever the evidence might be (t). As, however, the final verdict was the proper one on the evidence, the Court refused to interfere with the conviction, but reduced the sentence to six weeks on the curious ground that the superseded verdict ought to have been considered by the judge in mitigation of sentence.

The doctrine to be deduced from all these cases is that a drunken man cannot plead a general innocent intention in the sense that, by reason of his intoxication, he did not know that what he was doing was wrong :

(p) *Sic* ; *sed vide R. v. Carroll, supra*. The reference should be to *R. v. Meakin, supra*.

(q) *Per Darling, J.*, 2 Cr. A. R. 54 ; *cf. R. v. Caldwell*, 6 Cr. A. R. 151 (1911) ; *R. v. Galbraith*, 8 Cr. A. R. 101 (1912).

(r) 7 Cr. A. R. 173 (1912).

(s) *Cf. R. v. Dooddy* (1854), *supra*.

(t) *Vide R. v. Yeaton*, 9 Cox, 91 (1861) ; *R. v. Meany*, *ib.* 231 (1862) ; *R. v. Gray*, 17 *id.* 299 (1891).

but, where the crime charged against him is one involving full intent of a particular consequence, he may allege that his drunkenness prevented his entertaining such full intent, and proof of that fact to the satisfaction of the jury (*u*) will entitle him to an acquittal.

The presumption that a man intends the natural consequences of his act must here be adverted to. As will be shown in the next chapter, that presumption applies in a very different manner to crimes involving full intent, on the one hand, and to ordinary crimes involving only *mens rea* in the general sense, on the other.

In the case of crimes involving full intent, drunkenness may be pleaded as rebutting the presumption. In ordinary crimes the presumption cannot be so rebutted, because it would be much more difficult to show the absence of ordinary *mens rea* than to disprove full intent of a particular consequence; therefore the rule is absolute, that "drunkenness is no excuse for crime."

The distinction is well illustrated by the important case of *R. v. Hadfield* (*x*), where a drunken man was convicted of unlawfully altering some railway signals, whereby a train was caused to slacken speed:—

"Section 35 of 24 & 25 Vict. c. 97 deals with malicious obstruction to railways. The felony under this section consists, not in the wrongful act alone, but in its being done with a malicious intent. Then comes section 36, which creates a misdemeanour. Section 36 deals with an offence much less serious than that mentioned in section 35. The offence under section 36 is the unlawfully obstructing a train, not the obstructing it unlawfully with a malicious intent, as required by section 35. In this case, a drunken man unlawfully changed the signals. The natural result of this would be to stop the train, and to cause derangement of the whole machinery of the railway. If this is the natural result of the prisoner's act, is it not causing a train to be obstructed? There is nothing in section 36 to show that the obstruction must be a physical one. It is sufficient if a train is in fact obstructed" (*y*).

In other words, the full intention of a particular consequence is, by express enactment, made essential to an offence under sect. 35; and drunkenness precluding such intent may well afford a defence under that section; but, as such an intent is by no means essential under sect. 36,

(*u*) *R. v. Moubray*, 8 Cr. A. R. 8 (1912).

(*x*) L. R., 1 C. C. R. 253 (1870).

(*y*) Per Blackburn, J.

drunkenness can afford no excuse whatever for a contravention of the latter section.

The third, and only remaining, class of cases in which drunkenness may be admissible as a plea against conviction of crime is where the offence charged, according to its definition, requires a particular kind of ulterior intent, or a motive, as a special ingredient in *mens rea*.

The two chief examples of such crimes are larceny and burglary.

Larceny involves the taking of a chattel *animo furandi* (z), i.e., with intent to deprive the owner of the whole benefit of his title to the chattel (a); and, unless that intent be formed in the mind of the taker, the mere asportation does not suffice to constitute the crime.

"Accordingly a mere intention to take away the owner's possession from him temporarily will not suffice; as where a schoolboy takes out of his master's desk a 'crib' wherewith to prepare a lesson. Similarly a husband who takes his wife's diary, merely that he may produce it as evidence against her on his petition for a divorce, does not commit a larceny. . . . To take a key merely for unlocking a safe, even though it be with the object of stealing the contents, is no larceny. And thus a boy may steal a ride without stealing the donkey (b). He does of course commit a trespass; but he does nothing that amounts, in the law of tort, to a 'conversion.' Nor will even his turning the animal loose, when he has finished his ride, necessarily constitute a conversion. But if he turned it loose at some place so remote that it would be unable to find its way back to its owner, he would usually be guilty of a conversion, and so of a larceny" (c).

The *animus furandi* which is essential to the crime of larceny is not a motive. It is the full intention of a particular consequence. The question whether knowingly (d) riding off on another man's beast does or does not amount to felony depends, not upon the motive of greed, spite or frolicsomeness with which the act may be done, but upon the defendant's reasonable expectation (viewed in the light of the maxim that a man intends the natural consequences of his acts) that the owner

(z) Bract., II., 508; cf. Dig. 47, 2, 1, 3; de furtis; et vide St. Hist., III., 131; 2 East, P. C. 553, 662, 685.

(a) Vide Kenny, Outl., 183.

(b) *R. v. Crump*, 1 C. & P. 658 (1825); *R. v. Philips*, 2 East, P. C. 662 (1801); *R. v. Addis*, 1 Cox, 78 (1844).

(c) Kenny, Outl., 210-11.

(d) *R. v. Pitman*, 2 C. & P. 423 (1826).

would, or that he would not, be likely to receive his property back again.

In principle, therefore, such cases appear to be indistinguishable from others, *e.g.*, murder, in which the full intention of a particular consequence is necessary to constitute *mens rea*; and drunkenness may, perhaps, here affect the question of guilt or innocence in precisely the same way as in the second class of offences above referred to.

In the case of burglary, the special mental ingredient required by the definition of the crime is, not a particular form or degree of intentionality, but a particular kind of desire or motive (*e*).

"There must be an intention to commit some felony (*e.g.* to kill, or to commit a rape, most commonly it is an intention to steal); though it is not necessary that the felony should actually be accomplished. Moreover, this intention must exist at the time of the breaking and the entering; and not arise merely after he is in the house. . . . Accordingly if only a tort, or even a misdemeanour, be intended—as, for instance, to get a night's shelter, or to commit an adultery or an assault—the breaking and entering for such a purpose will not be burglary, but either a mere civil trespass and no crime at all, or, if a crime, only an attempt to commit a misdemeanour (*f*). . . . The fact that the burglar actually committed some felony in the house is excellent evidence that he broke and entered it with an intention of committing this felony. Thus if he drank some wine which he found in the dining room, this theft would be evidence, though certainly only weak evidence, that he entered the house with intent to steal. In the great majority of cases the question of intention will resolve itself simply into 'Plunder or Blunder?' Drunkenness may be useful as evidence to support the latter alternative. But the question is not always an easy one to answer, and it often has to be determined by a somewhat weak chain of inference" (*g*).

This intent to commit a felony, essential to the crime of burglary, is "a present intention to do a future act." It is in reality a desire or motive, and not a form of intentionality in the sense of advertence to any particular circumstance or expectation of any particular consequence of a present act.

As observed by Professor Kenny, the fact of the prisoner's drunkenness may well be material, upon a charge of burglary, by way of defence on the ground of mistake of fact; *e.g.*, to show that the prisoner

(*e*) Vide *R. v. Rodley*, 9 Cr. A. R. 69 (1913), as to evidence of intent to commit rape.

(*f*) *R. v. Dobbs*, 2 East, P. C. 513 Ken. S. C. 176 (1770).

(*g*) Kenny, *Outl.*, 176-7.

blundered into someone else's house in mistake for his own. But it may also be material for another purpose, viz., to disprove the existence of a felonious motive, apart from any question of a mistake of fact. If the prisoner, though perfectly well knowing what he was doing when he broke and entered, merely desired to commit some drunken freak, he would be entitled to an acquittal. If, on the other hand, though in a partially intoxicated condition, he had sufficient sense left to form, and did form, a felonious design, and the breaking and entering were prompted by the motive of enabling himself to accomplish that design, then he ought to be convicted.

In short, burglary appears to constitute a peculiar exception at common law to the ordinary rule of criminal liability, whereby motive is disregarded as immaterial to the question of guilt or innocence; and the fact of intoxication may well be of decisive importance, by establishing the absence from the prisoner's mind of the burglarious motive which is essential to the felony.

There seems to be a dearth of judicial authority upon the subject of intoxication as a defence to a charge either of larceny or of burglary; and there is obviously more difficulty in establishing an effective plea of drunkenness where the crime charged is one against property than where it is a crime of personal violence involving full intent to kill or to do grievous bodily harm.

Drunken thieves and burglars are quite common types of felons; and Lord Coke's observation, *crimen ebrietas et incendit et detegit*, seems to apply with peculiar force to crimes involving *animus furandi* and felonious design; so that in practice it is commonly found very difficult to substantiate the plea of drunkenness as negating or precluding a larcenous intention or a burglarious motive.

Thus, in a recent case in the Court of Criminal Appeal, an appellant who had been convicted of stealing a pair of boots during a conversation with a pawnbroker's assistant urged that the jury had been misdirected, the judge having laid down to them Coke's proposition (*h*) that drunkenness was mere matter of aggravation. In dismissing the appeal, the Court said:—

“To suggest that a man is not guilty of larceny, when he takes a pair of boots and puts them up his coat, having previously entered into

(*h*) 1 Inst. 247, *supra*.

a lucid conversation with the shopman, is absurd. In the circumstances, the legal question of whether or not drunkenness could be a defence is immaterial " (i).

Upon an appeal from conviction of burglary, where the appellant alleged that he did not know what he was doing at the time, as he was under the influence of drink, the Court arrived at a sort of compromise, and though affirming the conviction, treated the prisoner's intoxicated condition as a reason for reducing the sentence :—

" Appellant was found guilty of burglariously entering a house with his boots off. He was under the influence of drink at the time, and though that does not excuse what he did, it affects the guilty intention which he must have had. The sentence of twelve months' hard labour was excessive, and would have to be reduced to six months' hard labour, and this to run from date of the conviction. The Court does not wish in any way to express an opinion conflicting with that of the justices with regard to the serious nature of the crime of burglary " (k).

It has been suggested by various writers, in explanation of the doctrine rejecting voluntary drunkenness as an excuse for crime, that the effect is " to make drunkenness itself an offence, which is punishable with a degree of punishment varying as the consequences of the act done " (l).

This is not exactly correct, although it is not far from the true explanation of the rule. The true explanation is, that drunkenness is not incompatible with *mens rea*, in the sense of ordinary culpable intentionality, because mere recklessness is sufficient to satisfy the definition of *mens rea*, and drunkenness itself is an act of recklessness. The law therefore establishes a conclusive presumption against the admission of proof of intoxication for the purpose of disproving *mens rea* in ordinary crimes. Where this presumption applies, it does not make " drunkenness itself " a crime, but the drunkenness is an integral part of the crime, as forming, together with the other unlawful conduct charged against the defendant, a complex act of criminal recklessness.

This explanation affords at once a justification of the rule of law, and a reason for its inapplicability when drunkenness is pleaded by way of showing absence of full intent, or of some exceptional form of *mens rea* essential to a particular crime, according to its definition.

(i) *R. v. Chapman*, 4 Cr. A. R. 54 (1910), per Lord Alverstone, C.J.

(k) *R. v. Morton*, 1 Cr. A. R. 255 (1908), per Pickford, J

(l) Clark, *Anal.*, 30 ; cf. Markby, par. 281.

CHAPTER VII.

ACTIVE NEGLIGENCE.

THE word *negligence* bears a double meaning. On the one hand, it may signify any of the various degrees of culpable intention short of full or complete intention (*e.g.*, rashness, recklessness, or temerity) as applied to active conduct; on the other hand, it may refer to any kind of culpable omission, and may include, in relation thereto, all the states of mind from "wilful default" (or full intention to omit the performance of one's duty) to mere forgetfulness.

The present chapter will be confined to negligence in the former sense, and will be devoted to the consideration of the various *degrees of intentionality* necessary to the perpetration of such crimes as depend upon the actual or probable happening of a particular consequence, or mischief.

No definition of criminal negligence can ever be framed which would in any particular case supply a decision as to the guilt or innocence of the defendant in respect of the act charged, and responsibility for its consequences (*a*). If such a thing were possible, it would not be the definition of a legal principle, but would amount to a device for superseding the system of trial by jury.

A definition can, however, be arrived at, as in the case of any other legal conception, for the purpose of marking out the principle to be applied, in any case where criminality short of full criminal intent is alleged; and this result can best be attained through a consideration of the distinctions drawn by the Courts in relation to homicide.

It may be stated, in general, of crimes less grave than homicide, that the law draws no distinctions between one degree of guilty intention and another, except such as may arise out of the express terms of a particular penal statute. But the distinction between wilful murder and involuntary manslaughter turns upon nothing else but the difference

(a) Vide *R. v. Noakes*, 4 F. & F. 920 (1866), note (a); cf. *Kenny*, Outl., 142, not

between full guilty intention and culpable negligence, so that in capital trials the discrimination between full and imperfect intention, and between the various degrees of the latter, is of the utmost importance, and has frequently received long and minute consideration.

Coke defines murder as being committed "where a person of sound memory and discretion unlawfully killeth any reasonable creature in being and under the king's peace, with malice aforethought, either express or implied" (b).

It is now firmly established that, in the definition of wilful murder, malice means simply full intention (c).

"Malice, in its legal sense, denotes a wrongful act done intentionally, without just cause or excuse" (d).

"In the crime of murder, which is always stated in the indictment to be committed with malice aforethought, it is neither necessary in support of such indictment to show that the prisoner had any enmity to the deceased, nor would proof of absence of ill-will furnish the accused with any defence, when it is proved that the act of killing was intentional, and done without any justifiable or excusable cause" (e).

Nor is premeditation necessary to constitute "malice aforethought," or the crime of murder. Homicide committed suddenly, if without sufficient provocation, is as much murder as a deliberately effected homicidal plot. Accordingly, where a jury brought in a verdict of "murder, but we believe it was done without premeditation," Byles, J., rejected the verdict, and told them: "You are not asked to say whether it were premeditated or not. If the prisoner killed the woman, he is guilty of murder" (f).

Attempts have been made to distinguish between long and short premeditation, and to justify the finding of murder, in cases of intention suddenly conceived, by suggesting that there is in fact some premeditation, though it be of short duration (g). The word *premeditation*,

(b) 3 Inst. 47.

(c) Fost. 256, 262; 1 East, P. C. 215; *R. v. Vamplew*, 3 F. & F. 520 (1862); *R. v. Fairbrother*, 1 Cr. A. R. 233; et vide *R. v. Ellwood*, ib. 181 (1908).

(d) *M'Pherson v. Daniels*, 10 B. & C. 203 (1829); *R. v. Noon*, 6 Cox, 139 (1852); cf. *R. v. Syme*, 6 Cr. A. R. 257 (1911).

(e) *R. v. Harvey*, 2 B. & C. 268 (1823), per Best, J.

(f) *R. v. Maloney*, 9 Cox, 6 (1861).

(g) St. Dig., art. 244, note (p. 182, n. 3).

however, properly signifies some amount of deliberation, during the interval between the original forming of an intention and its execution, an element which is by no means essential to the crime of murder.

In short, "malice aforethought," *malice prepense* and *malitia præcogitata*, as applied to the definition of murder, are misleading and senseless expressions (*h*).

A correct definition of murder, apart from the doctrine of constructive murder (*i*), would be—*felonious homicide fully intended*. It may be more precisely defined as homicide by act or omission of legal duty, committed with the full expectation that death will or may probably result; and not covered by the privilege attaching to certain occasions by virtue of special justification or excuse (*k*).

"It is not that, at the moment he takes away life, he is acting on some deliberate design. It is only that the party has done the act knowing that he does it, and that the means are such as, in all human reason, are likely to produce death" (*l*).

However many varieties of murderous "malice" may be discovered and distinguished one from another (*m*), they are all (except in the doubtful case of constructive murder) reducible to the single requirement of full homicidal intention; for an intent to do grievous bodily harm is sufficiently dangerous to life to be reckoned homicidal, and to be treated, for all practical purposes, as equivalent to an intent to kill, in accordance with the presumption that a man intends the natural consequences of his acts.

Manslaughter is usually defined as the unlawful and felonious killing of another, without any malice, express or implied. This definition amounts to nothing more than that manslaughter is any unlawful homicide short of murder. A complete definition should, however, indicate in what cases, and under what circumstances, homicide, other than murder, is unlawful.

On the one hand, manslaughter is differentiated from murder either—

(*h*) Cf. Clark, Anal., Chap. 7; Kenny, Outl., 132-3.

(*i*) Vide *post*, Chap. IX.

(*k*) *Post*, Chap. XII.

(*l*) Per Coleridge, J., *R. v. Kirkham*, 8 C. & P. 116 (1837).

(*m*) Vide St. Dig., art. 244; Kenny, Outl., 133-7.

(1) As "involuntary manslaughter," by the absence of full or complete intent, or

(2) As "voluntary manslaughter," by the existence of great and sudden provocation.

On the other hand, lawful homicides may be classified as consisting only of two kinds—

(1) Excusable homicide, *per infortunium*, the excuse being grounded solely upon the absence of intent ;

(2) Excusable homicide, *se defendendo*, and justifiable homicide, both of which are lawful independently of the presence or absence of intent to kill, being excused or justified solely by reason of some privilege attaching to the occasion.

Apart, then, from constructive homicide, and from special occasions of excusability or justification (*n*), the problem of discriminating between murder, manslaughter, and innocent homicide resolves itself into an examination of three states of mind, tolerably distinct one from another :—

(1) The culpable state of mind of the murderer, who fully intends the death of his victim.

(2) The state of mind, again culpable, of a person who knows, or ought and is presumed to know, that death may probably result from his acts, but who does not fully intend or expect that consequence.

(3) The innocent state of mind of one who, although causing the death, does not at all intend that result, and acts with such care as legally absolves him from the unforeseen consequences of his conduct.

In short, subject to the presumption imputing to every man an intention of the natural consequences of his acts, the differences between wilful murder, involuntary manslaughter, and homicide by misadventure correspond exactly to the differences between full intention, imperfect intention, and absence of intention ; which, in turn, correspond to those between extreme probability of the consequence, weak probability, and mere possibility without probability (*o*).

In cases of difficulty the real problem usually is to mark where mere possibility becomes probability, or where the probability becomes imminent.

(*n*) Chaps. IX. and XII., *post*.

(*o*) Cf. 1 East, P. C. 262.

Recklessness of behaviour may be sufficiently gross to constitute full intention, and if the obvious danger of the prisoner's conduct shows that he must have expected a fatal result as extremely likely to ensue, the act amounts to murder. The test is, whether the probable danger to life of the conduct in question was both *great and apparent*, in which case it amounts to murder (*p*).

The killing people by throwing planks or stones, etc., from a house, or branches from a tree, into or near a street or road is a familiar example of an act which may constitute murder, manslaughter, or excusable homicide by misadventure, according to the circumstances; the complexion of the act depending upon the locality, the number of persons passing, or likely to pass and to incur danger, and the question whether a sufficient warning, or any warning at all, be given (*q*).

In a clear case of homicidal acts evidently accompanied by full intention to cause the victim's death, there is no *via media* between a conviction of murder and an acquittal, and the judge may therefore properly withdraw from the jury's consideration a defence of involuntary manslaughter (*r*).

Where the homicidal acts are deliberate, as well as obviously deadly, *e.g.*, where a woman is strangled by a belt tied or held round her neck till she dies, they must necessarily involve full intent; and in such a case the judge is entitled to tell the jury that there are no grounds for finding a verdict of manslaughter (*s*).

A husband, alleged to have been as a rule affectionate to his wife, lost his temper and caught her by the throat, strangling her to death. The jury found "that the prisoner killed his wife, that he was sane at the time, and that he acted in a fit of temper, without intending to kill her." Being asked to explain the last phrase, the foreman said: "The jury are unanimously and emphatically of opinion that at the moment of the act the prisoner did not realise the consequences of what he was doing." The judge then directed them to reconsider their verdict, saying that a man is held to intend the consequences of his act. They

(*p*) 1 East, P. C. 231; Hale, 431-2, 475; 1 Hawk., c. 29, s. 9; c. 31, ss. 5-6; cf. *R. v. Vamplew*, 3 F. & F. 520, per Pollock, C.B. (1862).

(*q*) *R. v. Hull*, Kel. 40 (1864); cf. Fost. 262-3; Just. Inst., IV., III., 5; also, cf. the direction by Cresswell, J., in *R. v. Noon*, 6 Cox, 137 (1852).

(*r*) *R. v. Foy*, 2 Cr. A. R. 121 (1909).

(*s*) *R. v. Scholey*, 3 id. 183 (1909); cf. *R. v. Fletcher*, 9 id. 53 (1913).

finally found the prisoner guilty of murder, and strongly recommended him to mercy. The Court refused to set aside this verdict, saying that there was no evidence on which a verdict of manslaughter could properly be found, and that it was not a misdirection to tell the jury that a man is held to intend the consequences of his act; because the appellant, who committed the act causing death, must if sane be held to have intended that consequence (*t*).

Many acts of recklessness mentioned in the reports, or by the old writers of authority, are at once recognisable as obviously involving (according to the social customs of the present day) the guilt of manslaughter, at the least, in any case where they prove fatal.

Such are—the exposure of helpless infants (*u*); wantonly administering spirituous liquor to a child in arms (*x*); throwing a poker at a child (*y*); firing pistols in a street (*z*); or shooting with a rifle at a target in a field, without precautions (*a*); struggling for the possession of loaded firearms (*b*); or carelessly handling the same (*c*); setting a spring-gun or man-trap (*d*); or leaving a vicious horse loose in a field crossed by a public footpath (*e*).

An iron-founder who, instead of melting down a burst cannon patched it up, so that it burst again when fired with an ordinary charge, and thereby killed a man, was convicted of manslaughter by negligence (*f*).

A man may be guilty of manslaughter as the result of recklessness in driving a cart or other vehicle furiously (*g*), or carelessly, as where he is

(*t*) *R. v. Philpot*, 7 Cr. A. 140, per Lord Alverstone, C.J. (1912).

(*u*) *R. v. Waters* 2 C. & K. 864 (1848).

(*x*) *R. v. Martin*, 3 C. & P. 211 (1827); cf. *R. v. Packard*, C. & M. 236 (1841); et vide Children Act, 1908, s. 119.

(*y*) *R. v. Conner*, 7 C. & P. 438 (1835).

(*z*) *R. v. Burton*, 1 Str. 481 (1721).

(*a*) *R. v. Salmon and Others*, 6 Q. B. D. 79 (1880).

(*b*) *R. v. Archer*, 1 F. & F. 351 (1858); *R. v. Wesley*, ib. 528 (1858); cf. *Blades v. Higgs*, 11 H. L. C. 621; et vide Russ. 783, note (*z*).

(*c*) *R. v. Jones*, 12 Cox, 628 (1874); cf. Fost. 264.

(*d*) *R. v. Heaton*, 60 J. P. 508 (1896); et vide 24 & 25 Vict. c. 100, s. 31.

(*e*) *R. v. Dant*, 10 Cox, 102 (1865); cf. 1 Hawk., c. 31, s. 8; Hale, I., 430.

(*f*) *R. v. Carr*, 8 C. & P. 163 (1832).

(*g*) *R. v. Walker*, 1 C. & P. 320 (1824); *R. v. Timmins*, 7 id. 499 (1836); *R. v. Kew and Jackson*, 12 Cox, 455 (1872).

near-sighted and does not take necessary precautions (*h*), or sit inside the cart instead of walking by the side of the horse, when that is necessary (*i*); or in riding a bicycle recklessly (*k*); or driving a motor car with excessive heedlessness (*l*); or by both drivers of separate vehicles inciting each other to furious driving, or racing against each other, irrespectively of the question as to which of them actually causes the death, for they are both principals (*m*).

The slinging of a cask, over a public street in Liverpool, by a single rope tied round the centre of the cask, which resulted in its dropping from the height of the fourth storey, and killing two women in the street below, was the subject of an indictment for manslaughter, upon which the prisoner was convicted (*n*).

On the other hand, an accident due to momentary thoughtlessness, reasonably accounted for, does not involve the guilt of manslaughter. So, where an attendant at a lunatic asylum told a patient to get out of a bath, and, thinking him to have done so, and having his attention called away for a moment, turned on the hot water tap, whereby the lunatic was scalded to death, the jury properly returned a verdict of misadventure (*o*).

Practical jokes, and wanton play, although of an innocent kind, have frequently led to convictions of manslaughter; *e.g.*, the overturning of a two-wheeled cart by removing a trapstick or pin (*p*); or lifting up the shafts (*q*); the breaking of a scaffolding in a mine, by casting large stones down (*r*); putting hot cinders on a sleeping man's belly, with

(*h*) *R. v. Grout*, 6 C. & P. 629 (1834).

(*i*) *R. v. Dalloway*, 2 Cox, 273 (1847).

(*k*) *R. v. Parker*, 59 J. P. 793 (1895); et vide *R. v. Thirgood*, 63 id. 442 (1899); *R. v. Hughes*, ib. 698.

(*l*) *R. v. Davis*, 43 L. J. N. 38 (1908); *R. v. Gylee*, 1 Cr. A. R. 242 (1908); *R. v. Dalloz*, ib. 258; cf. *R. v. Crowden*, 6 id. 190 (1912), as to wanton driving, and *R. v. Moorhouse*, 47 L. J. N. 65 (1913), as to manslaughter by driving motor car so as to frighten horses.

(*m*) *R. v. Swindall*, 2 C. & K. 230 (1846).

(*n*) *R. v. Rigmaidon*, 1 Lew. 180 (1833).

(*o*) *R. v. Finney*, 12 Cox, 625 (1874), coram Lush, J.

(*p*) *R. v. Sullivan*, 7 C. & P. 641 (1836).

(*q*) *R. v. Lear and Kempson*, Russ. 782 (1832).

(*r*) *R. v. Fenton and Others*, 1 Lew. 179 (1830).

straw round him (s) ; or throwing a large box from a pier into the sea, where it kills a person bathing (t).

In circumstances of this description, murder is seldom charged against the prisoner, the motive of the crime affording sufficient indication that fatal consequences could not have been anticipated as imminent, though they ought to have been contemplated as in some degree probable.

On the other hand, there is no privilege or excuse for treating persons playing practical jokes, however mischievous, as outlaws. The shooting at, and killing, a person who has terrified the neighbourhood by pretending to be a ghost is not manslaughter, but murder (u), because one can hardly shoot at a person without fully intending to hit him.

Similar considerations apply to homicides occurring in the course of boxing contests, football matches, and other sports not in their nature unlawful as involving great danger to human life. The sole question, in such cases, usually is, whether there were gross recklessness, or even full intent to kill or to do such bodily injury as might probably cause death (x).

“ No rules or practice of any game whatever can make that lawful which is unlawful by the law of the land ; and the law of the land says you shall not do that which is likely to cause the death of another ” (y).

Upon an indictment for killing a man in a sparring match with gloves, the prisoners were acquitted of manslaughter, upon a direction by Bramwell, B., to the effect that if death ensued from a fight, which was dangerous, in the sense of being likely to kill, it would be manslaughter, but the medical evidence in this case was that the sparring was not dangerous. He left the issue to the jury, because the death might be proved to have ensued from the continuance of the fight until the men were so exhausted as to be likely to fall dangerously and that might amount to manslaughter (z).

Where the prisoner and the deceased had been playing football according to Association rules, and in charging the deceased the prisoner

(s) *R. v. Errington*, 2 Lew. 217 (1833).

(t) *R. v. Franklin*, 15 Cox, 163 (1883).

(u) *R. v. Smith*, Russ. 764 (the Hammersmith Ghost Case (1804)).

(x) Fost. 259-260 ; 1 East, P. C. 268-271.

(y) *R. v. Bradshaw*, 14 Cox, 83 (1878), per Bramwell, L.J.

(z) *R. v. Young*, 10 Cox, 371 (1866) ; cf. *R. v. Orton*, 14 Cox, 226 (1878).

kicked him in the stomach with his knee, inflicting fatal injuries, the same judge directed the jury (who acquitted the prisoner) as follows:—

“ If a man is playing according to the rules and practice of the game, and not going beyond (a), it may be reasonable to infer that he is not actuated by any malicious motive or intention, and that he is not acting in a manner which he knows will be likely to be productive of death or injury. But if the prisoner intended to cause serious hurt to the deceased, or if he knew that in charging as he did he might produce serious injury, and was indifferent and reckless whether he did so or not, then the act would be unlawful (b). ”

In *R. v. Moore* (c) the prisoner (who had been playing “ back ” in a football match) was convicted of manslaughter by running after the deceased (who was playing “ forward ” on the opposing side, and had just passed the prisoner and made a shot at the goal) and jumping with his knees up against the deceased’s back, so that the deceased fell forward upon the goalkeeper’s knee, and suffered internal injuries which proved fatal. Hawkins, J., said that the rules of the game were quite immaterial, and it did not matter whether the prisoner broke the rules or not (d). Football was a lawful game, but it was a rough one, and persons who played it must be careful to restrain themselves so as not to do bodily harm to any other person. No one had a right to use force which was likely to injure another, and if he did use such force and death resulted, the crime of manslaughter had been committed. If a blow were struck recklessly which caused a man to fall, and if in falling he struck against something, and was injured and died, the person who struck the blow was guilty of manslaughter, even though the blow itself would not have caused injury.

Where the death of a child, or other person under lawful subjection (e), is caused by beating or correction, the circumstances may render it murder or manslaughter, but if the correction were in no degree excessive it is merely excusable homicide.

(a) Cf. *R. v. Moore, infra*; vide Kenny, Outl., 111, note.

(b) *R. v. Bradshaw*, 14 Cox, 83 (1878).

(c) 14 T. L. R. 229 (1898).

(d) See vide *R. v. Bradshaw, supra*.

(e) Vide *Gardner v. Bygrave*, 6 T. L. R. 23 (1889)*; *Cleary v. Booth*, 1893, 1 Q. B. 465; Kenny, Outl., 108-9.

Thus, the using of an iron bar or sword, running through a servant's belly with a piece of hot iron, or kicking and stamping upon a child are acts of such unwarrantable violence as to show a murderous intent (*f*); and the same inference may be drawn from the using of a thick and heavy stick (*g*), though in such cases the indictment may by indulgence assign a slighter degree of criminality to the act (*h*).

In a case of killing a boy by hitting him on the head, for an act of negligence, with a stake found lying close by, Nares, J., directed the jury that if they thought this an improper instrument of correction, they would further consider whether it was probable that it was used with an intent to kill, and if so they must find the prisoner guilty of murder; but if they were persuaded that it was not done with that intent, the crime would then at most amount to manslaughter. The latter verdict was returned, although the former would seem to have been warranted by an act of such violence (*i*); and it was also found to be manslaughter only, where a boy was struck with a small clog, which he had not cleaned as he should have done, the jury coming to the conclusion that it was an unlikely thing to kill him (*k*).

In a case of throwing a four-legged stool at a child's head, a special verdict was returned, and the judges never solved the questions arising thereon (*l*).

A father was indicted for murder at the Worcester Spring Assizes in 1775, having beaten his son to death with a rope, after receiving complaints of thefts committed by the child, which he obstinately denied. The prisoner satisfied the Court that he had only intended the correction, however severe, for the lad's own good, and was convicted of manslaughter (*m*).

A woman, *in loco parentis*, often cruelly punished her niece for not doing the excessive work allotted to her, and refused to believe that she was ill, although she was in fact dying of consumption, and it was proved that her death was hastened by her cruel treatment, Vaughan, J., held

(*f*) *R. v. Grey*, Kel. 64; Ken. S. C. 105 (1666).

(*g*) Vide Fost. 294; *Rowley's Case*, 12 Rep. 87.

(*h*) *R. v. Hopley*, 2 F. & F. 201 (1860).

(*i*) *R. v. Wiggs*, 1 Leach, 378, n. (1785).

(*k*) *R. v. Turner*, 1 Ld. Raym. 143-4; 2 id. 1498.

(*l*) *R. v. Hazel*, 1 Leach, 368 (1785).

(*m*) 1 East, P. C. 261-2.

that there was not sufficient proof of intent to constitute murder, inasmuch as the prisoner believed the child to be shamming, and to be able to do the work required of her. The prisoner was therefore convicted of manslaughter only (n).

A man who killed his baby, aged two years and a half, by striking her for a childish fault with a strap an inch wide, was convicted of manslaughter, upon the direction of Martin, B., that—

“The law of correction has reference only to a child capable of appreciating correction, and not to an infant two years and a half old. Although a slight slap may be lawfully given to an infant by her mother, more violent treatment of an infant so young by her father would not be justifiable” (o).

The case last cited illustrates the necessity of excluding from the consideration of homicides by correction any question as to the amount of provocation suffered. No doubt the behaviour of a child two or three years old can be as irritating as that of an older person; but the correction proper to be inflicted is always to be regulated by its probable effect on the child, not by the feelings of the person administering the punishment.

Considerations of a rather different character arise where recklessness of human life takes the form, not of a physical act of violence, but of the assumption of an excessive responsibility, or carelessness in the performance of a duty.

How far is a surgeon or physician, or an unqualified person acting as such, answerable for the result of surgical treatment, or of the administration of drugs or supposed remedies; for accident or carelessness in the former, or for mistake in the latter? Upon these questions, the old books of authority express conflicting opinions, based upon unsatisfactory arguments (p); but modern decisions have clearly established that—

(a) There can be no criminal liability in the absence of gross negligence, *i.e.*, such rashness or carelessness as was, or ought to have been, recognised by the prisoner as imperilling the life of his patient.

(n) *R. v. Cheeseman*, 7 C. & P. 455 (1836).

(o) *R. v. Griffin*, 11 Cox, 402 (1869).

(p) *Mirror*, Book IV., Chap. 16; 4 Inst. 251; Hale, I., 429.

(b) Persons are not to be condemned for manslaughter merely by reason of their having undertaken cures without special qualifications ; but that circumstance is of great importance in considering the amount of rashness shown, especially where the skilled advice of qualified persons may have been readily procurable.

(c) The prisoner cannot plead misadventure in respect of the events immediately leading to the death, if they were directly attributable to his own prior acts of recklessness or negligence. The whole of his conduct must be considered, and if at any point he was " wickedly negligent " (or criminally reckless) he must answer for the consequences, including the being placed by his own fault in an awkward predicament, or the assumption of a responsibility for which he was not prepared.

(d) Criminal negligence has nothing whatever to do with civil negligence. The former may exist without the latter, or the latter without the former, because they have reference to totally different legal duties.

The earliest modern decision of importance on this subject arose on the indictment, for murder, of a man seventy-five years of age who, although not a regularly educated accoucheur, was in the habit of acting as a man-midwife (*g*). In a somewhat unusual predicament, he made a serious mistake, which not only caused the death of his patient, but showed great want of anatomical knowledge. He had, however, safely delivered many women. Lord Ellenborough directed the jury as follows :—

" It is for you to consider whether the evidence goes so far as to make out a case of manslaughter. To substantiate that charge, the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance, or the most criminal inattention (*r*). . . . It would seem that, having placed himself in a dangerous situation, he became shocked and confounded. . . . If you find the prisoner guilty of manslaughter, it will tend to encompass a most important and anxious profession with such dangers as would deter reflecting men from entering into it."

The jury brought in a verdict of misadventure (*s*).

In 1828 a chemist's apprentice was indicted for manslaughter in

(*g*) Cf. *R. v. Ferguson*, *R. v. Senior*, *infra*.

(*r*) Cf. *Rich v. Pierpont*, 3 F. & F. 41 (note).

(*s*) *R. v. Williamson*, 3 C. & P. 635 (1807).

causing the death of a child by negligently selling laudanum in a mistake for paregoric, in a bottle with the paregoric label on it (*t*), at the same time recommending the purchaser that ten drops should be given to the child. It was proved that there was a considerable resemblance between the two liquids, and that a person not very conversant with them might mistake the one for the other. Upon a direction simply leaving the question of negligence to them, the jury returned a verdict of guilty (*u*).

In *R. v. Van Butchell* (*x*), the trial of an indictment for manslaughter by an unsuccessful operation was stopped by Hullock, B., who laid it down that if a person, *bonâ fide* and honestly exercising his best skill to cure a patient, performs an operation which causes his death, he is not guilty of manslaughter, and that it makes no difference whether such person be a regular surgeon or not, nor whether he has had a regular medical education or not.

In the same year, however, an old woman was indicted for manslaughter of a man who had been discharged from an infirmary as cured, but to whom she gave a dose of corrosive sublimate, in order to "get the mercury out of his bones." This ill-advised attempt caused his death, and the prisoner could give no better account of her act than that she had obtained the mixture from a third party. Bayley, J., said :—

"I am clear that, if a person, not having a medical education, and in a place where persons of a medical education might be obtained, takes on himself to administer medicine which may have a dangerous effect, and such medicine destroys the life of the person to whom it is administered, it is manslaughter. The party may not mean to cause death ; on the contrary, he may mean to produce beneficial effects ; but he has no right to hazard medicine of a dangerous tendency where medical assistance can be obtained ; if he does, he does it at his peril."

Upon this direction the prisoner was convicted (*y*). It was an entirely reasonable direction (*z*), and meant no more than that, in assessing the amount of temerity evinced by the prisoner, in undertaking the cure, the fact of skilled advice being obtainable must be taken

(*t*) Cf. *R. v. Noakes*, *R. v. Spencer*, *infra*.

(*u*) *R. v. Tessymond*, 2 Lew. 169 (1828).

(*x*) 3 C. & P. 629 (1829).

(*y*) *R. v. Simpson*, 1 Lew. 172 (1829).

(*z*) Cf. Beven, 1160, *contra*.

into consideration, as a circumstance of the utmost importance. That doctrine of course assumes that (as was proved in the case in question) the physic administered was grossly unsuitable; otherwise, there would be no act of homicide to justify a prosecution (*a*).

In *R. v. Ferguson (b)*, the prisoner was indicted and convicted of manslaughter by negligence, in acting as a man-midwife and not doing what was needful on the birth of a child, whereby the mother was caused to die. Tindal, C.J., directed the jury:—

“You are to say whether, in the execution of this duty, which the prisoner had undertaken to perform, he is proved to have shown such a gross want of care, or such a gross and culpable want of skill, as any person undertaking such a charge ought not to be guilty of.”

There was a similar conviction in the case of *R. v. Senior (c)*, where the child died in consequence of the prisoner's clumsiness.

In *R. v. St. John Long (d)* the prisoner was tried twice, being convicted of one offence and acquitted of the other, the circumstances being, however, very similar in both cases. He was a “quack” doctor, and killed his patients in the attempt to cure consumption and throat complaints by rubbing dangerous mixtures on different parts of the body, and applying corrosive plasters, the result being to set up mortification, to alleviate which he recommended cabbage leaves, etc. Numerous witnesses, who had been treated by him, expressed confidence in his supposed skill. In the former of the two trials, resulting in a conviction, Garrow, B., said:—

“In *R. v. Van Butchell (e)*, the learned judge had very good ground to stop the case, as there was no good evidence as to what had been done. . . . I am of opinion that if a person, who has ever so much or so little skill, sets my leg, and does it as well as he can, and does it badly, he is excused; but suppose the person comes drunk, and gives me a tumbler-full of laudanum, and sends me into the other world, is it not manslaughter? And why is that? Because I have a right to have reasonable care and caution.”

(a) *R. v. Bull*, 2 F. & F. 201 (1860).

(b) 1 Lew. 181 (1830); et vide *R. v. Spilling*, 2 M. & Rob. 107 (1833); cf. *R. v. Williamson*, *supra*.

(c) 1 Lew. 183 (note).

(d) 4 C. & P. 398-423 (1830-1); cf. *R. v. Spiller*, *R. v. Crook*, *infra*.

(e) *Supra*.

Park, J., who took a somewhat different view as to the amount of negligence shown by the prisoner, said :—

“ Though he be not licensed, yet experience may teach a man sufficient ; and the question for you will be, whether the experience this individual acquired does not negative the supposition of any gross ignorance or criminal inattention. . . . On the one hand, we must be careful, and most anxious to prevent people from tampering in physic, so as to trifle with the life of a man ; and on the other hand, we must take care not to charge criminally a person who is of general skill, because he has been unfortunate in a particular case.”

In the second case, resulting in an acquittal, Bayley, B., directed the jury :—

“ It matters not whether a man has received a medical education or not ; the thing to look at is, whether in reference to the remedy he has used, and the conduct he has displayed, he has acted with a due degree of caution, or on the contrary has acted with gross and improper rashness and want of caution.”

In *R. v. Spiller* (f), upon an indictment for manslaughter in applying a corrosive and dangerous plaster upon a child's head, Bolland., B., told the jury, who acquitted the prisoner, that the law was as follows :—

“ If any person, whether he be a regular or licensed medical man or not, professes to deal with the life or health of His Majesty's subjects, he is bound to have competent skill to perform the task that he holds himself out to perform ; and he is bound to treat his patients with care, attention and assiduity.”

A publican, who was agent for the sale of a dangerous quack medicine called “ Morrison's pills,” was sent for by a young man suffering from small-pox, and attended him daily for ten days, at the end of which time his patient died. The prisoner administered considerable quantities of his deadly pills, and continued doing so until a few hours before the death, assuring the man's relatives on the very day of death that he was going on well. He was kind and attentive, and charged nothing but the usual price of the pills, the taking of which aggravated the disease and hastened the deceased's death. The jury convicted the prisoner, under the direction of Lord Lyndhurst, C.B., who said :—

“ I agree that in these cases there is no difference between a licensed physician or surgeon and a person acting as a physician or surgeon

without a license. In either case, if a party, having a competent degree of skill and knowledge, makes an accidental mistake in his treatment of a patient, through which mistake death ensues, he is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person totally ignorant of the science of medicine takes on himself to administer a violent and dangerous remedy to one labouring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter" (g).

A similar conviction resulted from the indictment of a butcher who undertook a surgical operation upon a human being (h).

In *R. v. Crick* (i), it was again laid down that—

"It is no crime for anyone to administer medicine; but it is a crime to administer it so rashly and carelessly as to produce death; and in this respect there is no difference between the most regular practitioner and the greatest quack."

In this case the prisoner was acquitted, there being some room for doubt as to the precise cause of the deceased person's death.

In *R. v. Crook* (k) a blacksmith was convicted of manslaughter, having undertaken the cure of a cancer in the face, which had been given up by the surgeons. He applied corrosive sublimate, causing the greatest agony, and accelerating death. The jury were directed by Watson, B., that if the prisoner used dangerous applications, he was bound to bring skill in their use, and that the prisoner's education and employment appeared to make the use of such dangerous substances almost amount to a want of skill.

The degree of negligence required to constitute manslaughter was well described by Willes, J., in his summing-up in a case where the jury acquitted an herb-doctor of manslaughter, he having caused the death of a patient by administering four times the amount of a fatal dose of colchicum seeds:—

"Gross negligence might be of two kinds. In one, a man for instance went hunting, and neglected his patient, who died in consequence. Another sort of gross negligence consisted in rashness: as when a person was not sufficiently skilled in dealing with dangerous medicines. . . . It was not, however, every slip that a man might make, that

(g) *R. v. Webb*, 1 M. & Rob. 405 (1834).

(h) *R. v. Whitehead*, 3 C. & K. 202 (1848).

(i) 1 F. & F. 519 (1859).

(k) 1 F. & F. 521 (1859).

would render him liable to a criminal investigation. It must be a substantial thing. If a man knew that he was using medicines beyond his knowledge, and was meddling with things above his reach, that was culpable rashness. Negligence might consist in using medicines in the use of which the person using them was ignorant. A person who so took a leap in the dark, in the administration of medicines, was guilty of gross negligence" (l).

In another case, the mistake of a chemist, in putting a poisonous liniment (henbane) into a medicine bottle instead of a liniment bottle, in consequence whereof it was taken internally, with a fatal result, was held under the circumstances not to amount to such criminal negligence as would warrant a conviction of manslaughter. Erle, C.J., told the jury that they could not convict on such a charge, unless there was such a degree of culpable negligence as the law meant by the word "felonious" :—

"No doubt there ought to be due care and caution in the dispensing of deadly drugs; but this was the case of a chemist put out of his ordinary course, by the customer sending bottles of his own. And though no doubt there was negligence, in not observing the label on the bottle, on the other hand, it was the case of a customer who had for years been sending for aconite, and only rarely for henbane. Without saying that there might not be negligence in a civil action, he did not think that there was sufficient to support a conviction" (m).

A similar conclusion was arrived at in the case of a duly qualified medical man, who mistook strychnine for bismuth, and, upon being confronted with the death of his patient in consequence of the mistake, took some of the medicine himself, to show his *bonâ fide* belief in its harmlessness, suffering convulsions as the result. Willes, J., remarked that "this was not like the case of a quack, who had not skill to master what he had undertaken" (n).

An acquittal again resulted, on the prosecution of a retired surgeon of long experience, who, after administering to his wife, for sleeplessness, sixteen and a half grains of morphia, fetched a practising doctor, too late to avert death. Denman, J., told the jury that—

"The law was this : whether a man were a medical man or not, if he dealt with dangerous medicines, he was bound to use them with proper

(l) *R. v. Markuss*, 4 F. & F. 356 (1864).

(m) *R. v. Noakes*, 4 F. & F. 920 (1866); cf. *R. v. Tessymond*, *supra*.

(n) *R. v. Spencer*, 10 Cox, 525 (1867).

skill, and was bound to bring proper care. . . . The jury might be enlightened by looking at the relations between the parties. . . . There was great difference of opinion as to the quantity of the drug which could be administered safely. . . . If the drug was administered without want of skill, and intending to do for the best,—doing nothing, in fact, a skilful man might not do—then if the jury thought it was some error of judgment, which anybody might have committed, the prisoner should be acquitted " (o).

Often, from the evidence offered upon an indictment for manslaughter, there is so obvious a remoteness of the consequence from the facts within the prisoner's knowledge (or rather, so little apparent probability of its happening) that he could not reasonably be supposed to have expected it in any considerable degree. In such cases there is no manslaughter, although the death may have resulted from the prisoner's act—*e.g.*, where a bystander is killed by a stray shot at the butts, or in the shooting of game (p); or where horse-play, though of a rough-and-tumble character, unexpectedly results in a collision with a passer-by, who dies in consequence (q).

A striking instance of this rule, of irresponsibility for remote or fortuitous consequences, is the conclusive presumption that there can be no felonious homicide where death ensues after an interval of a year and a day from the inflicting of the mortal wound, or other cause of death (r). This ancient rule of law is justified by the evident improbability that a fatal consequence, ensuing after such an interval, could be foreseen or expected by the person causing it, with such degree of probability as would suffice to constitute criminal intention.

Nice questions arise upon the point of remoteness, where acts of the deceased intervene between the act of the prisoner and the deceased's death.

In one case the prisoner was standing on a schooner, and the deceased in a small boat alongside; and the prisoner, to end a dispute between them, pushed the boat off with his foot. The deceased, stretching out to lay hold of a barge, so as to prevent the boat from drifting away, lost his balance, fell overboard, and was drowned.

(o) *R. v. MacLeod*, 12 Cox, 534 (1874); cf. *R. v. Zeifert*, 148 O. B. Sns. Prs. 630.

(p) 1 East, P. C. 269.

(q) *R. v. Bruce*, 2 Cox, 262 (1847).

(r) 1 Hawk. c. 31, s. 9; 1 East, P. C. 343-4; *R. v. Dyson*, 1 Cr. A. R. 14 (1908).

Here, the act of the deceased was hardly such as the prisoner could be expected to foresee as the natural consequence of his own act; and the jury accordingly returned a verdict of misadventure (s).

There is a special class of cases, where the intervening act of the deceased has been induced by alarm at the prisoner's conduct, and the question has arisen, how far it was a necessary or reasonable act, and so ought to have been expected by the prisoner as likely to take place.

In *R. v. Evans* (t) the prisoner's wife was alleged to have thrown herself out of a window, after being beaten by the prisoner, and in consequence of his threats. Heath, Gibbs and Bayley, JJ., held that, on the assumption that the death was occasioned partly by the blows and partly by the fall, if the latter were caused by a well-grounded apprehension of the prisoner's doing such further violence as would endanger her life, he was as much answerable for the consequences of his wife's fall as if he had thrown her out himself. The jury, however, found that the woman had thrown herself out of the window "from her own intemperance," and not under the influence of the threats.

In *R. v. Hickman* (u) a prisoner was convicted of murder. He assaulted the deceased, both being on horseback; and the deceased, from a well-grounded apprehension of a further attack, spurred his horse, which became frightened and threw the deceased, doing him a mortal injury.

In *R. v. Pitts* (x) Erskine, J., summed up as follows upon another charge of murder:—

"A man may throw himself into a river, under such circumstances as render it not a voluntary act; by reason of force, applied either to the body or to the mind. It becomes then the guilty act of him who compelled the deceased to take that step. But the apprehension must be of immediate violence, and well grounded, from the circumstances by which the deceased was surrounded; not that you must be satisfied that there was no other way of escape, but that it was such a step as a reasonable man might take. Here, all the circumstances show that, even if the deceased did throw himself into the river, it must have been from circumstances arising out of a scuffle with the prisoner or some other person, or from apprehension of further violence."

(s) *R. v. Waters*, 6 C. & P. 328 (1834).

(t) Russ. 666 (1812).

(u) 5 C. & P. 151 (1831).

(x) C. & M. 284 (1842).

The prisoner was acquitted, but ought to have been convicted of manslaughter at the least. He was upon a subsequent trial convicted of robbing the deceased of his watch.

In *R. v. Towers* (y) the prisoner, who had assaulted a woman carrying a baby, was alleged to have so frightened the child as to cause its death, which occurred about six weeks afterwards. Denman, J., laid it down that—

“Murder could not be committed upon a grown-up person by using language so strong or so violent as to cause that person to die; therefore mere intimidation, causing a person to die from fright, working upon his fancy, was not murder. But there were cases in which intimidation had been held to be murder. If, for instance, four or five persons were to stand round a man, and so threaten him and frighten him as to make him believe that his life was in danger, and he were to back away from them, and tumble over a precipice, to avoid them, then murder would have been committed.

“Then, did or did not this principle of law apply to the case of a child of such tender years as the child in question? For the purposes of the case he would assume that it did not; for the purposes of to-day he should assume that the law about working upon people by fright did not apply to the case of a child of such tender years as this. Then arose the question which would be for them to decide: whether this death was directly the result of the prisoner’s unlawful act,—whether they thought that the prisoner might be held to be the actual cause of the child’s death,—or whether they were left in doubt upon that, upon all the circumstances of the case.”

Upon this rather confused direction, the jury very properly acquitted the prisoner of manslaughter.

Again, in *R. v. Sawyer* (z) there was an indictment for manslaughter “by fright,” the prisoner’s wife having thrown herself from a window in his presence; but there was little evidence as to what had actually occurred between them. Stephen, J., directed the jury to say if, in their opinion, either by actual violence or threats of violence on the part of the prisoner, the deceased was forced, as her only means of escape, to jump from the window. In that case it would be manslaughter. But if she did the act, constrained by despair operating upon her mind, that would not be sufficient; and they should acquit him. This they did.

(y) 12 Cox, 530 (1874).

(z) Ken. S. C. 94 (1887).

In a recent case the Court refused to interfere with a verdict of manslaughter under almost precisely similar circumstances, and expressed the opinion that a verdict of murder might well have been justified, although there was no evidence of any act, on the prisoner's part, beyond frightening his wife out of the window by running at her to hit her (a).

It may be deduced from the foregoing cases, as a clear rule of law, that when death directly and naturally follows, and is caused by, the act of putting a person in a state of panic, whether by actual violence or by threats of immediate personal injury, such conduct amounts to murder or to manslaughter, according to the degree of probability with which the fatal acts of the deceased in such state of panic ought to have been anticipated by the prisoner.

Similar considerations apply to cases where, between the act of a prisoner and the death charged against him, there are intervening acts of third persons, contributing more or less to the fatal result.

There may, probably, be murder by the commission of perjury in a capital trial, though the point appears to have been purposely left in doubt (b). The probability of capital execution following upon the act of deliberately swearing a man's life away would certainly suffice, in principle, to render the death imputable to the perjured witness. *Qui facit per alium facit per se* is a maxim applicable in criminal as well as in civil cases; and the public hangman may be an innocent agent, as well as anybody else.

Some difficulty may be thought to arise where the intervening conduct of third parties, or of the deceased himself, was not intended by the prisoner, although he was guilty of some form of homicidal intention. At first sight, it would seem that, if the course of events were so unexpected as to make it obvious that the prisoner did not intend the successive events, or means by which death was brought about, the death itself could not be imputable to him, although attributable to his act.

This, however, is a fallacy. A man can intend a particular consequence of his act (either fully or imperfectly) without intending in any degree the exact means by which the end anticipated by him is actually accomplished.

(a) *R. v. Curley*, 2 Cr. A. R. 96 and 109 (1909).

(b) *R. v. Macdaniel and Others*, 1 Leach, 44 (1756).

It was upon this ground that the judges upheld the conviction (c) of a woman who had put out a child to nurse, and (with intent that it should be killed) given the nurse some laudanum, telling her it was a proper medicine for the child, and directing her to administer a teaspoonful every night. The nurse took it home, but, thinking the child required no medicine, had no intention of administering it, and left it on the mantel-piece of her room. Some days afterwards a little boy innocently took the laudanum from its place, and gave the prisoner's child a much larger dose than a teaspoonful. Littledale, J., directed the jury that if the prisoner gave the laudanum to the nurse with intent that she should administer it to the child, and thereby produce its death, the quantity so administered being sufficient to cause death, and if (the prisoner's original intention still continuing) the laudanum was afterwards administered by an unconscious agent, the death of the child under such circumstances was murder on the prisoner's part. Also, that if the teaspoonful was sufficient to produce death, the administration by the little boy of a much larger quantity would make no difference.

For the like reason, it has been repeatedly held that, where the prisoner fully intended to cause death, or to inflict a serious bodily injury, which might probably lead to death, he does not escape responsibility by reason that the death, not immediately happening, is in some degree due to a refusal to submit to an operation, or to take proper treatment, or to mistaken treatment of a patient by a qualified surgeon. In such cases, the prisoner, having intended the immediate death of his victim, or immediate danger to his life, cannot object that the course of events was more protracted than he had expected, and so did not exactly correspond with his intention.

A person was waylaid and assaulted by the prisoner and severely cut across one of his fingers, but refused to have it amputated, though informed by a surgeon that his life would be in great hazard. Lockjaw came on and proved fatal, the amputation being performed too late. It was proved to have been likely that life would have been saved if the finger had been amputated in time. Maule, J., directed the jury that if the prisoner wilfully, and without justifiable cause, inflicted the wound which was ultimately the cause of death, he was guilty of murder; it

made no difference whether the wound was in its own nature instantly mortal, or whether it became the cause of death by reason of the deceased not having adopted the best mode of treatment; the real question was whether in the end the wound was the cause of death (*d*).

Upon an indictment for murder in a duel, Erle, J., directed the jury that where a wound is given, which in the judgment of competent medical advisers is dangerous, and the treatment which they *bonâ fide* adopt is the immediate cause of death, the party who inflicted the wound is criminally responsible; and he observed that, to admit evidence in support of the allegation that the operation performed on the deceased was unnecessary would be to raise a collateral issue in every case as to the degree of skill which the medical men possessed (*e*).

Mathew, J., gave a similar direction, in a case where the deceased had died under chloroform, properly administered by a qualified surgeon for the purpose of a necessary operation (*f*).

The same considerations would govern a decision where the unlawful conduct of the prisoner resulted, not in the inflicting of a mortal wound, but in the setting up of a fatal disease.

"It does not appear to me that by calling the consequences of an accidental injury a disease one alters the nature of the consequential results of the injury that has been inflicted" (*g*).

There is no doctrine of contributory negligence in criminal law.

"So highly does the law value human life, that it admits of no justification wherever life has been lost and the carelessness or negligence of any one person has contributed to the death of another person" (*h*).

"There is no balance of blame, in charges of felony; but wherever it appears that death has been occasioned by the illegal act of another, that other is guilty of manslaughter in point of law . . . whatever may have been the negligence of the deceased himself" (*i*).

(*d*) *R. v. Holland*, 2 M. & Rob. 351 (1841); cf. *Governor Wall's Case*, 28 St. Tr. 51 (1802); vide Kenny, Outl., 127; et cf. Hale, I., 428; Kel. 26.

(*e*) *R. v. Pym*, 1 Cox, 339 (1846).

(*f*) *R. v. Davis*, 15 Cox, 174 (1883).

(*g*) *Brintons v. Turvey*, 1905, A. C. 230, per Lord Halsbury, at p. 235.

(*h*) *R. v. Swindall*, 2 C. & K. 230, per Pollock, C.B. (1846); cf. *R. v. Hutchinson*, 9 Cox, 555, per Byles, J. (1864); *R. v. Dant*, 14 Cox, 102, per Mellor, J. (1865).

(*i*) *R. v. Longbottom*, 3 Cox, 439 (1849).

In *R. v. Kew and Jackson* (*k*) the prisoner Jackson was alleged to have furiously driven the prisoner Kew in a trap to catch a train. The trap ran over and killed one of several children in the road, but it was alleged for the defence that the child negligently ran out into the road, and so caused its own death. On the question of contributory negligence, Byles, J., said, although it would have been an answer to an action, yet in a prosecution—

“If they [*i.e.*, the children] were all negligent together, I think their negligence would be no defence, even if they had been adults. If you are of opinion that the prisoners were driving at a dangerous pace, in a culpably negligent manner, then they are guilty. It is true that Kew was not actually driving, but still, a word from him would have prevented the accident.”

The prisoners were, however, acquitted.

Although contributory negligence is no defence upon a prosecution for manslaughter, yet, where death arrives in a roundabout way, the difficulty of proving culpable negligence against the prisoner to the satisfaction of a jury may well be increased by the intervening acts of the deceased or of third persons; especially if they be such as the prisoner could not be supposed to have foreseen, and if there be some room for doubt as to his homicidal intention, or as to the degree of recklessness evinced by him. And even if criminal negligence be proved to the satisfaction of a jury, contributory negligence on the deceased's part may well afford grounds for alleviation of sentence (*l*).

In all such cases the chief question for consideration should be, not whether the prisoner could have anticipated the exact consequences which actually supervened upon his act, but whether, apart from expectation of any particular consequences leading up to the death, he had sufficient reason to suppose, in a general sense, that his act was imperilling human life.

Where a prisoner was indicted for the murder of his wife by kicking her, and a surgeon had administered brandy to her as a restorative, some of which went the wrong way, entered her lungs, and immediately caused her death, Coleridge, J., gave the jury a rather confused direction, to the effect that the case was like one where a dangerous wound was given, and an operation was performed, but that the question

(*k*) 12 Cox, 355 (1872); cf. *R. v. Jones*, 11 Cox, 544 (1870), overruling *R. v. Birchall*, 4 F. & F. 1087 (1866).

(*l*) *R. v. Stubbs*, 8 Cr. A. R. 238 (1913).

for them was "whether prisoner had any intention or contemplation of killing. He might have kicked a hundred times, without producing the effect which took place." They nevertheless returned a verdict of manslaughter (*m*), probably on the ground that to kick the woman senseless was, apart from any question of the administration of brandy, a dangerous thing to do.

A station-master at Brighton was indicted for manslaughter of several persons killed by collision in a tunnel. It was his duty to check trains out of his station one after another, at intervals of not less than five minutes. Upon an excursion day there were three trains, all late, and he started them so that the third followed the second at an interval of about three or four minutes only. By some subsequent mistake in the signalling of the trains at the tunnel, which was seven miles out of Brighton, the second train was brought to a standstill in the tunnel, and the third was signalled through and ran into it.

The grand jury threw out the bill, under the direction of Erle, J., who said :—

"They must be satisfied there was a *prima facie* case of such criminal negligence as had been the proximate and efficient cause of the catastrophe. The negligence imputed appeared to be the sending on one train after another in a shorter interval of time than, according to the rules, he ought to have done. There had been, however, some mistake on the part of other of the company's servants, in regard to the signals. A mistake, indeed, was said to have arisen from the negligence of the defendant. Still, if the particular negligence imputed to the prisoner appeared not to have been the proximate and efficient cause of the catastrophe, the bill for manslaughter ought not to be found; and if it appeared that other causes had intervened, the prisoner's negligence would not have been the proximate and efficient cause of the deaths which had occurred" (*n*).

This puts the question as if it were one entirely of causation. It would, however, in such a case, be more consistent with the principles underlying criminal liability, as well as more easily explainable to a jury, if the question were put simply as one of intentionality, the real issue being whether or not the prisoner had sufficient reason to suppose that his conduct might probably lead to a disaster.

(*m*) *R. v. McIntyre*, 2 Cox, 379 (1847); cf. *R. v. Monks*, 72 O. B. Sns. Prs. 424 (1870); vide Kenny, Outl., 128.

(*n*) *R. v. Ledger*, 2 F. & F. 857 (1862).

Very similar considerations arose in the much-discussed case of *R. v. Bennett* (o), where a man carried on the business of manufacturing fireworks, in contravention of statute law (p), and, without any personal interference or negligence on his part, a fire broke out amongst certain combustible materials in his possession, collected by him, and in the course of use for the purposes of his business, but not completely made into fireworks at the time. A case was reserved by Willes, J., upon the question whether he could be properly convicted of manslaughter in respect of a death caused by the fire, and Cockburn, C.J., said :—

“The keeping of fireworks in the house of the defendant caused the death only by the super-addition of the negligence of someone else. . . . The keeping of the fireworks may be a nuisance, and if, from the unlawful act of the defendant, death had ensued as a necessary and immediate consequence, the conviction might be upheld. The keeping of the fireworks, however, did not alone cause the death ; *plus* that act of the defendant, there was the negligence of the defendant’s servants. . . . The view which we all take of the case is, that the prisoner cannot be convicted upon these facts.”

In other words, it was held that there was no evidence from which the inference could properly be drawn that the defendant supposed his conduct, in collecting combustible materials, to imperil human life.

A homicidal act, even of the simplest kind, may fall short of murder by reason of improbability of the fatal consequence, apart altogether from any intervention by third parties—*e.g.*, by reason of a peculiar state of the victim’s bodily health, whereby death supervenes more or less unexpectedly (q).

In a recent trial at the Old Bailey, before Bankes, J., for homicide of the prisoner’s mistress, it appeared that, in a fit of jealousy, she had threatened to leave him ; he caught her by the throat to detain her, and this sudden shock caused her heart to cease beating. It was shown by medical evidence (obtained from Germany during a postponement of the trial) that the deceased was suffering from *status lymphaticus*, a

(o) 8 Cox, 74 (1858) ; vide Russ. 792 (note (1)).

(p) 9 Will. 3, c. 7, since repealed ; see now the Explosives Act, 1875 (38 & 39 Vict. c. 17).

(q) Cf. Kenny, Outl., 109

curious disease, which is believed to be accompanied by an enlargement of the lymphatic glands of the body (often especially marked in the thymus) and by extreme weakness of the heart and liability to heart failure on the slightest shock. In view of this evidence, which was accepted by the medical witnesses for the prosecution, the prisoner's plea of manslaughter was accepted, and the capital charge was not proceeded with (*r*).

From a close consideration of the foregoing and other decided cases it appears that, in assessing the various degrees of intentionality to be inferred from the evidence in trials for homicide, the Courts follow certain rules of law, which may conveniently be stated in the following order :—

1. Every homicide is *prima facie* presumed to be fully intended (*s*) ; the onus is therefore on the prisoner (*t*) to show, unless it appears, as it often does, from the facts proved by the prosecution (*u*), that a fatal consequence was not fully intended (so that it would amount to manslaughter only) or was not intended at all (so that it would be excusable). This is merely an application to homicide of the general rule that the onus lies upon the prisoner in all cases to disprove the existence of *mens rea* on his part, and not upon the prosecution to prove it (*x*).

2. In view of the general presumption that a man intends the natural consequences of his acts, the requirement of that full homicidal intention which is, subject to the doctrine of constructive homicide (*y*), necessary for the commission of murder, is satisfied by an intention to do grievous bodily harm, or by any other form of extreme recklessness (*z*).

(*r*) *R. v. Alabaster*, 47 L. J. N. 397 (1912) ; cf. Poore, 362-3.

(*s*) *R. v. Greenacre*, 8 C. & P. 35 (1837) ; *R. v. Noon*, 6 Cox, 137 (1852) ; et vide 1 East, P. C. 224.

(*t*) *R. v. Oneby*, 2 Str. 266 (1726).

(*u*) *R. v. Holden*, 8 C. & P. 606 (1838).

(*x*) Fost. 255 ; cf. art. "Some Points on the Law of Murder," 67 J. P. N. 519, where it is suggested that the peculiar form of the presumption in relation to homicide originated in "Presentment of Englishry," under the law introduced by Canute (Wilk. 280).

(*y*) Vide *post*, Chap. IX.

(*z*) Vide *R. v. Holloway*, Cro. Car. 131 ; Ken. S. C. 103 and note (1628).

3. With regard to the distinction between manslaughter and misadventure, the standard of conduct set by the law is, that no person shall consciously do any act which may endanger human life, even by the "taking of a risk" (a); and that, where there is any apparent possibility of such danger, reasonable caution must be used to guard against it—i.e., such caution as has been found in the ordinary course of things to be sufficient (b).

4. Where the death is attributable to the prisoner's conduct, he cannot be relieved from criminal liability on the ground that the deceased assisted in his own destruction by act or omission. The plain question, in every case, is whether the prisoner's conduct was unlawful, in the sense of being calculated to endanger life.

5. In every case the prisoner is presumed to intend the natural consequences of his acts—i.e., to expect such consequences, according to the degree of their apparent probability (c); but there is no such presumption where the prisoner could not be supposed to have expected the fatal consequence with such degree of certainty or likelihood as is necessary to constitute murder or manslaughter, as the case may be.

It is for the jury, under proper directions, to decide upon the intention actually evinced by the prisoner, where any question arises thereon (d), but they must follow the rules of law above stated, and should be directed in accordance therewith, so far as the circumstances of the trial may require.

Where, however, one of the presumptions above referred to is clearly applicable, and obviously suffices to dispose of any question as to intention, the judge is at liberty to assume that the jury will find in accordance therewith.

Thus, in a note to *R. v. Hopley* (e), the reporters observed that "the instrument, being in its own nature *not* unfit, the mere size or weight

(a) *R. v. Gylee*, 1 Cr. A. R. 242 (1908).

(b) *R. v. Hughes*, 26 L. J. M. C. 102; 7 Cox, 301 (1857).

(c) Cf. Bl. Comm., IV., 197; Holmes, 56-7.

(d) *Fost.* 255-6; cf. *R. v. Slaughterford*, 18 St. Tr. 326; Russ. 826 (1709).

(e) 2 F. & F. 207; cf. Holmes, 59-60; *R. v. Fisher*, 8 C. & P. 182 (1837); Russ. 826.

might be for the jury. But if it had been in its own kind and nature utterly unfit—as, if it had been the poker—it would have been for the Court, as a matter of law.” In other words, the use of a poker would obviously bring the case within the presumption of law that the prisoner intended the natural consequence of his act; and the judge might direct the jury accordingly, instead of leaving the prisoner’s intention to them, as a matter of doubt for their decision.

Turning to crimes other than homicide, we find it necessary again to advert to the distinction between intention as applied to acts in relation to their consequences and intention as applied to acts considered apart from their consequences (*f*). This distinction leads to a division of crimes in general (for the present purpose) into three classes :—

(1) Those in which *full* intent of a particular consequence is an essential ingredient—*e.g.*, murder, arson, wounding with intent to murder or to do grievous bodily harm, larceny, and crimes requiring an intent to defraud.

(2) Those to which some degree of intention, with reference to a particular consequence, is essential, but which do not require full intent thereof—*e.g.*, manslaughter, malicious damage and the misdemeanour of unlawful and malicious wounding, or inflicting grievous bodily harm.

(3) Those not involving the expectation of any particular consequence, in which intention is confined to mere knowledge of present facts—*e.g.*, bigamy and assaults (*g*).

The first class of crimes, whereof wilful murder is the type, may be considered as governed by such of the rules of law above stated as relate to the full intent necessary to constitute the capital crime.

The presumption as to intending the natural consequences of one’s acts applies to crimes of this class in its narrowest, though most rigorous, form. The prisoner is presumed to have *fully* intended the consequence in question, if the circumstances rendered its occurrence extremely probable (*h*). But if the consequence was not such as should

(*f*) *Ante*, Chap. I., “Intentionality,” and “Culpability.”

(*g*) Vide *Ackroyd v. Baret*, 11 T. L. R. 115 (1894).

(*h*) *R. v. Probert*, 2 East, P. C. 1030 (1800), and *R. v. Harris and Atkins*, *ub. sup.*, as to arson; *R. v. Sheppard*, R. & R. 169 (1816), and *R. v. Hill*, 2 Moo. 30; *Ken. S. C.* 208 (1837), as to forgery.

reasonably have been *fully* expected to occur, the prisoner (in the absence of proof of actual intent) is entitled to an acquittal of the crime charged against him (*i*).

Under an old statute (*k*), a man was indicted for setting fire to a mill, "with intent to injure" the owners thereof; but the only evidence was his own confession, and there had been no particular motive for the crime. Asked how he came to do it, he replied that he did not know, except that the devil put it into his head. Upon conviction, Le Blanc, J., respited sentence, but the judges upheld the conviction, on the ground that a party, doing an act wilfully, necessarily intended that which must be the consequence of the act, viz., injury to the owner of the mill burned (*l*).

Under a railway Act, which provided that if any person should "do any act, matter, or thing to obstruct the free passage of the railway or any part thereof" he should be liable to a penalty, it was held that, to render a party criminally liable, the obstruction must have been intentional (*i.e.*, fully intended), and that where a person was driving a waggon over a level crossing, and the waggon became hitched to the gatepost, and so collided with the train, the party was not liable to the penalty, though guilty of carelessness (*m*).

Upon an indictment for maliciously cutting, where the prisoner had been struggling with two men who were trying to wrest a knife from him, with which he desired to do one of them an injury, and in the struggle he stabbed the other man, against whom he harboured no ill-will, and the jury found a general intent to do grievous bodily harm to anybody who might be struck with the knife, that verdict was held sufficient, and the conviction^{*} affirmed (*n*).

So, where a man fired a pistol into a group of people, without aiming at any one of them in particular, it was held that he might be properly

(*i*) *R. v. Child*, 1 C. C. R. 307 (1871), as to arson; *R. v. Marcus*, 2 C. & K. 356; Ken. S. C. 205 (1846), and *R. v. Hodgson*, D. & B. 3; Ken. S. C. 201 (1856), as to forgery.

(*k*) 43 Geo. 3, c. 58 (see now Malicious Damage Act, 1861, s. 30).

(*l*) *R. v. Farrington*, R. & R., 207 (1811); cf. *Roper v. Knott*, 1898, 1 Q. B. 868.

(*m*) *Batting v. Bristol and Exeter Railway*, 3 L. T. 665; cf. *R. v. Hadfield*, *ante*, Chap. VI.

(*n*) *R. v. Hunt*, 1 Moo. 93 (1825); cf. *R. v. Gillow*, *ib.* 85, and *R. v. Boyce*, *ib.* 29.

convicted of shooting at the person whom he actually hit, with intent to do grievous bodily harm to that person (o).

A man may be convicted of wounding another with intent to do him grievous bodily harm, although he wound him under a misapprehension as to his identity (p).

Under an old statute (q) which required a wilful "cutting," with an intent in so doing, or by means thereof, to murder or rob, it was held that the instrument used need not be appropriate for cutting; and, where the prisoner used a blunt instrument with intent, not to cut, but to break or lacerate the victim's head, that was sufficient intent to support the indictment (r).

Where a man battered his wife's skull in with a hammer, having travelled from some distance on purpose to do her an injury, and was indicted for feloniously wounding her with intent to murder her, and with intent to do her grievous bodily harm, but convicted of the latter offence only, his appeal from the conviction on the ground that the judge did not leave to the jury a third alternative, viz., the misdemeanour of unlawful wounding, was dismissed by the Court, regard being had to the nature of the evidence :—

"It is contended that not telling the jury they might reduce the crime to unlawful wounding, on this indictment, amounts to misdirection. This Court cannot take that view. The option of the jury to find the lesser offence must depend on the circumstances of the case" (s).

A prisoner was recently convicted of shooting with intent to resist his lawful apprehension. He was one of three men in a plantation, and was alleged to be a novice in the use of firearms. He had just cocked his gun, when two keepers saw him and his companions, and one of them ran after the prisoner. After proceeding sixty yards, the prisoner turned round, and his gun went off, wounding the keeper who was pursuing him. At the trial, the defence set up was that the gun went off

(o) *R. v. Fretwell*, 9 Cox, 471 (1864); see now Offences Against the Person Act, 1861, s. 18.

(p) *R. v. Stopford*, 11 Cox, 643 (1870), overruling *R. v. Hewlett*, 1 F. & F. 91 (1858) and following *R. v. Smith*, 7 Cox, 51 (1855).

(q) 43 Geo. 3, c. 58.

(r) *R. v. Hayward*, R. & R. 78 (1805).

(s) *R. v. Naylor*, 5 Cr. A. R. 19 (1910), per Lord Alverstone, C.J.; cf. *R. v. Foy*, *R. v. Scholey*, and *R. v. Philpot*, *ante*.

accidentally, but, in summing up, the judge told the jury that a man must be taken to intend the natural consequences of his acts, and that it was for the prisoner, and not the prosecution, to satisfy them that the gun went off accidentally. On appeal, the conviction was quashed, upon the ground that the direction might have been understood by the jury as laying down the incorrect proposition that a person must be taken to intend the consequences, not only of his intentional acts, but also of his accidental acts (*t*).

Such a misunderstanding could be arrived at only by a jury of extraordinary stupidity, because there are no such things as "accidental acts." A movement of the body which is purely accidental is not an act at all (*u*).

The second class of crimes, where it is not necessary to prove full intent, but *mens rea* frequently consists of some lighter degree of intentionality, with reference to a particular consequence, may be regarded as governed by the law concerning involuntary manslaughter, which is here the typical crime. There is, however, this difference, that in the case of homicide, full intent is incompatible with the commission of involuntary manslaughter, whereas in respect of any other crime the law draws no distinction between full intent and such lesser degrees of intentionality as suffice to constitute guilt.

The standard of lawful conduct, in all such cases, is that reasonable caution must be used not to commit such acts as may probably lead to the consequence in question.

Here, the presumption as to intending the natural consequences of one's acts has a wider application, but does not necessarily impute full intent; for *mens rea* or "malice" in this class of offences may consist of mere rashness, or carelessness as to the happening of the consequence forming the mischief of the crime, without full or complete expectation thereof (*x*).

In *R. v. Dixon* (*y*), where a baker was indicted for supplying to the Royal Military Asylum certain loaves of bread containing crude lumps of alum, and thereby injuring the health of some children, it was proved

(*t*) *R. v. Davies*, 29 T. L. R. 350 (1913).

(*u*) *Ante*, Chap. I., "Intentionality"; *post*, Chap. X., "Casus."

(*x*) *R. v. Welch*, 1 Q. B. D: 23 (1875).

(*y*) 3 M. & S. 11 (1814).

that, though the use of the alum might have been permitted by the defendant to his foreman (for the purpose of whitening the bread), great care was usually employed in such use, under his directions. The defendant moved for a new trial on the ground that a principal could not be answerable for his agent criminally, but only civilly (z); and he also moved for an arrest of judgment on the ground that the indictment did not show that he intended to injure the children's health, but only that he delivered the loaves for their use, "not even showing that he intended the children should eat them, whereas the *malus animus* is of the very essence of the crime, and therefore should be shown upon the record." The Court refused a rule either for a new trial or for arrest of judgment, and Lord Ellenborough, C.J., said :—

"He who deals in a perilous article must be wary how he deals; otherwise, if he observe not proper caution, he will be responsible; and the statute (a) having interdicted alum in the making of bread, shows that it must be considered as a perilous article. . . . It is a universal principle that, when a man is charged with doing an act, of which the probable consequence may be highly injurious, the intention is an inference of law, resulting from the doing of the act" (b).

So, in *Core v. James* (c), although it was held that, in order to constitute an offence under the Bread Act, 1836 (d), of "using" alum in bread for sale, there must be a guilty knowledge on the part of somebody concerned in the act of user, yet it was expressly laid down that if a journeyman (e) or servant (f) should knowingly use the forbidden ingredient, his master, "although innocent" (i.e., although guilty of only remote intentionality, or carelessness, in neglecting the duty of personal supervision in the use of a dangerous and forbidden article), would be liable to be convicted.

Again, in *R. v. Ward* (g), a conviction of unlawful and malicious wounding was upheld in a case where the prisoner shot at a man, or

(z) Vide *post*, Chap. X.

(a) 36 Geo. 3, c. 22, s. 3; now rep., vide Bread Act, 1836, *infra*.

(b) At pp. 14-15; approved, per Blackburn, J., *R. v. Hicklin*, L. R. 3 Q. B. 375 (1868), and per Amphlett, J., *R. v. Aspinall*, 2 Q. B. D. 48, 65 (1876).

(c) L. R. 7 Q. B. (1871).

(d) 7 Will. 4, c. 37, s. 8; *secus* under the Act of 1875; cf. *Betts v. Armstead*, *ante*, Chap. II.

(e) Per Lush, J., at p. 137.

(f) Per Hannen, J., at p. 138.

(g) L. R. 1 C. C. R. 356 (1874).

rather in his direction, with the intent to frighten, but not to hurt, him—it being held by twelve judges out of fifteen that his temerity in so doing constituted “malice.”

On the same principle it is no sufficient defence, in this class of crimes, to show that the act of the prosecutor, or of third parties, contributed to the happening of the consequence complained of; and if that consequence was a probable one, the fact that the prisoner did not foresee the exact means by which it was brought about does not diminish his guilt.

In *R. v. Martin* (*h*) a man was held to have been rightly convicted of unlawfully and maliciously inflicting grievous bodily harm upon two persons in a theatre; he having caused a panic by extinguishing the lights and obstructing the exit, and the two persons in question having been severely injured in the struggling of the crowd to escape. He acted unlawfully and maliciously “in the sense of doing an unlawful act, calculated to injure, and by which others were in fact injured” (*i*).

So also, the decisions with regard to injuries caused by putting persons in such a state of panic as to make them throw themselves from windows follow the same principles as have been applied to cases of homicide (*k*).

It was indeed held by Alderson, B., upon an indictment for causing an injury dangerous to life by casting the prosecutrix out of a window upon the ground, that it would not be sufficient to prove that she jumped from the window to escape from the prisoner’s violence: the jury must be satisfied that he “intended” at the time to make her jump out (*l*).

But if *intended* here meant *fully* intended, the decision appears to have been wrong, and to have been overruled by the two cases next to be noticed.

In *R. v. Halliday* (*m*) the prisoner came staggering into his bedroom, and threatened his wife, who ran to the window, and opened it to get out. Her daughter caught hold of her, but the prisoner, being then within reach of her, called out, “Let the b—— go!” This order being obeyed, the woman fell into the street and broke her leg. Whilst she

(*h*) 8 Q. B. D. 54 (1881).

(*i*) Per Lord Coleridge, C.J.

(*k*) Vide *R. v. Evans*, *R. v. Hickman*, *R. v. Pitts*, *R. v. Sawyer*, and *R. v. Curley*, ante.

(*l*) *R. v. Donovan*, 4 Cox, 399 (1850).

(*m*) 54 J. P. 312; 61 L. T. N. S. 701 (1889).

lay there the prisoner jeered at her from the window, saying that it served her right. This curiously callous husband was held to have been rightly convicted of wilfully and maliciously inflicting grievous bodily harm upon his wife.

This decision has been recently followed, upon an appeal from conviction by a man who broke into a woman's house at night time, when she was in bed, and beat and kicked at her bedroom door. When he had nearly burst in, the woman jumped out of the window, falling to the ground from a height of twelve feet, and doing herself serious injuries. The prisoner, who was convicted of inflicting grievous bodily harm (*n*), complained, among other things, of misdirection, but his appeal was dismissed :—

“ It is said that the judge gave a wrong direction as to the law on the subject. He put to the jury : ‘ Will you say whether the conduct of the prisoner amounted to a threat of causing injury to this young woman ; was the act of jumping the natural consequence of the conduct of the prisoner ; and was the grievous bodily harm the result of the conduct of the prisoner ? ’ We think that that was a proper direction, as far as the law went ; we are satisfied that there was evidence before the jury of the prisoner's causing grievous bodily harm to the woman. No one can say that if she jumped through the window, it was not the natural consequence of the prisoner's conduct. It was a very likely thing to do, as the result of the threats of a man who was conducting himself as this man indisputably was ” (*o*).

It may be observed that motive has a less close connection with intention, in this class of crimes, than in crimes to which full intent is essential.

In the class of crimes typified by wilful murder, although motive may in some cases be altogether distinct from, it more commonly concurs with the full intent which constitutes *mens rea*. A man who fully intends to do grievous bodily harm to another usually so intends because he desires to cause him extreme pain and suffering.

But in the class of crimes now under discussion, particularly where full intent is not in fact entertained, but the act is characterised by

(*n*) Under the Offences Against the Person Act, 1861, s. 20.

(*o*) *R. v. Beech*, 7 Cr. A. R. 197, per Darling, J. (1912).

mere recklessness, motive is frequently directed to a different consequence than that forming the mischief of the crime.

In *R. v. Moore* (p) it was held that a person using his land for pigeon shooting could properly be convicted of a nuisance to the highways and adjoining lands, by reason of his thereby occasioning crowds of persons to collect outside the ground, for the purpose of shooting at the stray pigeons which escaped. Littledale, J., said :—

“ It has been contended that, to render the defendant liable, it must be his object to create a nuisance ; or else that that must be the necessary and inevitable result of his act. No doubt, it was not his object ; but I do not agree with the other position : because, if it be the probable consequence of his act, he is answerable as if it were his actual object. If the experience of mankind must lead anyone to expect the result, he will be answerable for it ” (q).

The third class of crimes, in which the culpability of the criminal conduct does not depend upon the occurrence of any particular consequence, involves altogether different considerations ; and the task of ascertaining the presence or absence of culpable intentionality in such cases is usually one of less complexity.

The *mens rea*, in such crimes as bigamy, perjury, unlawful assaults, and the like, is a culpable intention lying wholly in the present and having no reference to future contingencies.

It is true that, in some cases, rashness or carelessness may be said to characterise such conduct, but not as a form of intentionality concerning consequences. It is, under some circumstances, an act merely of rashness, or criminal carelessness, for a man once married to go through the form of a second marriage, without the certain knowledge that his wife is dead ; but the culpability lies, not in rashness or carelessness with regard to any contingencies affecting other persons, but in the doing a prohibited act without making due inquiries as to existing facts.

The rules as to ascertaining intentionality in cases of homicide and other crimes depending upon particular consequences have therefore

(p) 3 B. & A. 184 ; 37 R. R. 383 (1832).

(q) Cf. *Beatty v. Gillbanks*, 9 Q. B. D. 308 (1882) ; *Wise v. Dunning*, 1902, 1 K. B. 167.

no application to this class of crimes. *Mens rea* consists of mere advertence to the act done, and knowledge of, or neglect to inquire into, those facts which render it criminal ^(r).

But the class of crimes now under discussion includes some offences which, although not dependent upon the actual occurrence of any particular consequence, do depend upon the existence of a general tendency, in the conduct forbidden, to lead to certain mischievous results.

For example, upon a charge of publishing a seditious libel, it is not necessary to prove that any infraction of the law by third persons was thereby caused, or induced. Upon an indictment for that offence, Littledale, J., said :—

“ If this paper has a direct tendency to cause unlawful meetings and disturbances, and to lead to a violation of the laws, that is sufficient to bring it within the terms of this indictment, and it is a seditious libel ” ^(s).

The crime is complete upon the doing of an act characterised by a mischievous tendency ; and *mens rea* consists not in any degree of expectation in respect of any particular consequence proved to have happened, but in an intention to do an act forbidden by law on account of the essential tendency which it possesses.

This doctrine was probably intended to be conveyed in a dictum which, although of a rather obscure character, has been repeatedly quoted with approval in subsequent cases :—

“ Where an act, in itself indifferent, if done with a particular intent, becomes criminal, there the intent must be proved and found ; but where the act is in itself unlawful, as in this case ^(t), the proof of justification or excuse lies on the defendant, and in failure thereof the law implies a criminal intent ” ^(u).

Of the same character are all crimes the essential culpability whereof consists in their tendency to corrupt public morals or to lead to a breach

^(r) Vide Chap. II., *ante* ; *R. v. Havard*, 78 J. P. N. 400 (1914).

^(s) *R. v. Lorrain*, 3 C. & P. 462, per Littledale, J. (1839) ; cf. *R. v. Harvey*, 2 B. & C. 257 (1823).

^(t) Viz., an information for publishing the seditious libel contained in Junius's Letter to the King.

^(u) Per Mansfield, L.C.J., in *R. v. Woodfall*, 20 St. Tr. 895, 919 (1770), approved per Lord Kenyon, C.J., in *R. v. Topham*, 4 T. R. 126 (1791).

of the peace, such as blasphemy, criminal libels, unlawful assemblies (x), and incitements to any crime whatever (y).

In *R. v. Phillips* (z) it was even held that a mere endeavour to provoke a challenge to fight was in itself an indictable misdemeanour, although no challenge was returned and no fight took place. The defendant was convicted upon the last count of an indictment, charging that he, unlawfully and maliciously intending to do grievous bodily harm to one Thomas, and to break the peace, etc., wickedly and maliciously did endeavour to stir up, provoke and excite Thomas to challenge him, the defendant, to fight a duel, by sending to Thomas a letter accusing him of acting like a blackguard, and promising to attend any appointment that Thomas might think proper to make. Upon motion in arrest of judgment, the conviction was upheld, and Lord Ellenborough, C. J., said :—

“ It has been argued on the part of the defendant, that the offence amounts to no more than an endeavour to provoke a person to challenge the defendant to fight a duel with him, with intent so to provoke him ; and that although the sending a challenge to fight may, on account of its direct and immediate tendency to a breach of the peace, be an indictable offence, yet that a mere endeavour to provoke a person by a letter so to do, such endeavour not in itself having a direct and immediate tendency to a breach of the peace, nor being alleged to be done or used with that intent, but having a tendency only to provoke a challenge, and a challenge having only a tendency to a breach of the peace, and not being of itself a breach of the peace, was too remotely dangerous to the public peace to be a subject of indictment as a substantive misdemeanour. . . . Although the intended effect may not have been produced, yet the means calculated and likely to produce such effect have been used. The letter was as much an act done towards the misdemeanour meant to be accomplished in this case, namely a challenge, as it was in the case of *The King v. Vaughan* (a), where the misdemeanour meant to be accomplished by the letter, offering a bribe to a minister of state, was the inducing such minister corruptly to recommend to an office of public trust. The means in each case were equally proper to effectuate their

(x) When “ legal as to the purpose, but illegal as to the manner ”; vide per Bayley, J., in *R. v. Hunt*, 1 St. Tr. 171 ; Ken. S. C. 388 (1820) ; cf. *R. v. Vincent*, 9 C. & P. 91 (1839), and *R. v. Coney*, 8 Q. B. D. 534 (1882).

(y) *R. v. Higgins*, 2 East, 5 (1801) ; *R. v. Gregory*, L. R. 1 C. C. R. 77.

(z) 6 East, 464 ; 8 R. R. 511 (1805) ; cf. *R. v. Langley*, 2 Ld. Raym. 1094 ; and 1 Hawk. c. 63, s. 3 ; et vide 8 R. R. 518 (note).

(a) 4 Burr. 2494.

respective purposes, and prosecuted to the same extent. And, if the sending of the letter in the case of *The King v. Vaughan*, to solicit a party to commit that misdemeanour, were properly held indictable, I am at a loss to see any reason why a letter sent to provoke and excite a person to the commission of the offence in question is not equally so."

So, a woman was convicted, again under Lord Ellenborough's direction, upon an indictment at common law, charging her with carrying a child, suffering from small-pox, along the public highway to the common danger, without its being either alleged or proved that she in any degree intended anybody to catch the disease. In passing sentence upon her, Le Blanc, J., expressly disclaimed any desire "to impute to the defendant an intention of being the cause of the consequences which had followed," viz., the death of two other children who had become infected (b).

There may be an indictable public nuisance, without any public inconvenience or suffering, if the acts complained of are shown to have given rise to a reasonable probability that such inconvenience or suffering might ensue (c)—and, under the same principle, in a prosecution for furious driving on a highway "so as to endanger the life and limb of any passenger" (d), it has been held by no means necessary to prove that there were in fact any passengers on the highway at the time, or that any life or limb was actually endangered by the defendant's conduct (e).

(b) *R. v. Vantandillo*, 4 M. & S. 73 (1815); cf. *R. v. Burnett*, 4 M. & S. 272 (1815).

(c) *R. v. Lister*, D. & B. 209 (1857); cf. *A.-G. v. Tod Heailey*, 1897, 1 Ch. 560.

(d) 5 & 6 Will. 4, c. 50, s. 78.

(e) *Chatterton v. Parker*, 1914, W. N. 206.

CHAPTER VIII.

CRIMINAL OMISSIONS. ✓

At the present day, apart from the law of homicide, the only instances at common law of pure criminal omission, or indictable neglect to perform *positive* duties imposed by the law itself, appear to be :—

(1) Contempts by failure to comply with mandatory orders of Court ;

(2) Public nuisances by nonfeasance ;

(3) Default in the maintenance of a public ferry, by the owners thereof (*a*) ;

(4) Refusal to serve a public office, *e.g.*, on appointment to a shrievalty (*b*) ;

(5) Misprision of felony (*c*) ;

(6) Failure by a magistrate to suppress a riot (*d*) ;

(7) Failure by any person to assist public officers in such suppression (*e*), in the arrest of offenders (*f*), or in the keeping of the peace (*g*).

Under various statutes, some of which embody and extend the earlier provisions of the common law, the principal indictable offences by nonfeasance are :—Misprision of treason (*h*) ; default in joining the *posse comitatus*, or the hue and cry (*i*) ; failure, on the part of the master or a member of the crew of a merchant vessel, to resist attack by pirates (*k*) ; failure to render assistance to persons in danger at sea (*l*) ;

(*a*) *Payne v. Partridge*, 1 Salk. 12 (1691), per Holt, J. ; *Letton v. Goodden*, L. R. 2 Eq. 123, 131, per Sir R. T. Kindersley.

(*b*) *R. v. Woodrow*, 7 T. R. 731.

(*c*) 3 Inst. 140 ; 1 Hale, 373 ; cf. St. Dig., art. 175 and note ; Rent. & Rob., IX., 271.

(*d*) *R. v. Kennett*, 5 C. & P. 283 (1781).

(*e*) *R. v. Brown*, C. & M. 314.

(*f*) *R. v. Crick*, 65 J. P. 713 (1901).

(*g*) *R. v. Sherlock*, L. R. 1 C. C. R. 20.

(*h*) Bract., III., 118 b, 141 ; 1 & 2 Ph. & M. c. 10, s. 18.

(*i*) Sheriffs Act, 1887, s. 8.

(*k*) Piracy Act, 1721, s. 6.

(*l*) Maritime Conventions Act, 1911, s. 6.

permitting, by officers or other persons under special duties, the escape of offenders, criminal lunatics or others in lawful custody (*m*); fraudulent omissions under the Falsification of Accounts Act, 1875; offences by omission under the Bankruptcy Act, 1914; wilful omission or neglect of duty by railway servants (*n*); wilful neglect, by persons having the charge of a vehicle, causing bodily harm (*o*), which offence, however, is hardly one of pure omission; and neglect of children (*p*), of servants or apprentices (*q*) or of lunatics or defectives (*r*).

Criminal omissions of a minor character, punishable summarily, are of more frequent occurrence, but are of no great interest in connection with questions as to *mens rea*.

Indeed, little if any special difficulty arises in the consideration of any criminal omissions other than homicide. Each of the offences by omission above enumerated constitutes a direct breach of a clear positive duty existing at common law or imposed by statute; and the ordinary doctrines of *mens rea* apply thereto, according to the character of the crime in question and the particular circumstances of each case.

Negligence, by the omission of a duty to perform certain acts prescribed by law, may consist of full intent, in the sense of advertence to the duty and a deliberate omission to discharge it, or of heedlessness, in either of two senses. Where the omission is due to prior conduct, which has already rendered the person unable to perform his duty when the time comes for it to be discharged, the negligence or heedlessness is precisely similar to active negligence (*s*), and consists of recklessness as to consequences. Where a culpable omission, not fully intended, is not attributable to prior active negligence, it must be due to forgetfulness, or culpable inattention to a particular matter at a particular time, when the law requires attention thereto (*t*).

These distinctions are of no great complexity, but their application

(*m*) Vide, *e.g.*, Criminal Lunatic Asylums Act, 1860, s. 12; Sheriffs Act, 1887, s. 29.

(*n*) Malicious Damage Act, 1861, s. 36, and Offences Against the Person Act, 1861, s. 34; vide *R. v. Holroyd*, 2 M. & R. 339 (1841), *ante*, Chap. VII.

(*o*) Offences Against the Person Act, 1861, s. 35.

(*p*) Children Act, 1908, ss. 12, 17, 38 (2); *R. v. Connor*, 1908, 2 K. B. 26.

(*q*) Offences Against the Person Act, 1861, s. 26; Conspiracy and Protection of Property Act, 1875, s. 6.

(*r*) Lunacy Act, 1890, s. 322; Mental Deficiency Act, 1913, s. 55.

(*s*) *Ante*, Chap. VII.

(*t*) *Ante*, Chap. I.

to various crimes differs according to the question how far intention or knowledge of fact may be essential to the criminal omission charged in the indictment. In nuisances, *mens rea* is not essential (*u*); and, on the other hand, certain of the statutory offences above enumerated require the neglect or omission to be "wilful," so that, in any prosecution, it would be necessary to prove full intention, and mere forgetfulness or heedlessness would not suffice for a conviction.

These are matters which, in view of the comparatively rare occurrence of the crimes affected, it is hardly necessary to consider here at greater length.

When, however, we turn to homicide by neglect, we have to deal with considerations not only of the utmost importance, but also of some subtlety.

It has been seen that when human life is imperilled by culpable acts of any kind, the law, while modifying the ordinary doctrine of *mens rea* by distinguishing *in favorem vite* between the various degrees of culpable intention, imposes upon all persons, under all circumstances, a general duty to take care, and punishes any breach thereof as an act of manslaughter.

In the matter of omission, there is no corresponding general duty compelling one man, on the ground of common humanity, to preserve the life of another, even under such circumstances as would undoubtedly impose on him a strong moral obligation so to do.

"Thou shalt not kill, but needst not strive,
Officiously, to keep alive" (*x*).

In other words, "omission, without a duty, will not create an indictable offence" (*y*), and whereas any *act* of homicide is felonious, it is necessary, in order to support a charge of manslaughter founded solely upon a criminal omission, to charge (*z*) and specially prove the existence of a legal duty, binding the defendant to do those acts the omission whereof is alleged to have had a fatal result.

(*u*) *R. v. Stephens*, *R. v. Medley*, *post*, Chap. X.; *Barnes v. Akroyd*, L. R. 7 Q. B. 474 (1872).

(*x*) Cf. Clark, *Anal.*, 44.

(*y*) *R. v. Smith*, 2 C. & P. 449 (1826).

(*z*) *R. v. Edwards*, 8 id. 611 (1838); *R. v. Barrett*, 2 C. & K. 343 (1846).

There was, at common law, a binding duty upon all parents to provide the necessary nourishment, clothing and shelter for their children (*a*). This duty has for a long time past been embodied in statute law (*b*), and extended to the protection of illegitimate children, the obligation in their case being incumbent on the mother (*c*), unless she be a married woman, in which case the liability is cast upon her husband (*d*). But the care of children is now, under sects. 12 and 38 of the Children Act, 1908, a duty cast upon all persons having the "custody, charge, or care" of them, whether as parents, persons *in loco parentis*, putative fathers (*e*), or in any other capacity. Poverty is no excuse for neglect of children; it merely alters the obligation of maintenance to that of applying for poor law relief (*f*). There are similar duties of maintenance in respect of helpless apprentices and servants (*g*), and persons mentally afflicted (*h*).

A charge of manslaughter, or even murder, may arise solely by non-feasance, from the breach of any of these duties, upon proof that the person neglected was quite unable to take the necessary care of himself or herself (*i*).

The necessity of proving strictly the existence of a legal duty was well illustrated in a case where a married woman was indicted for the murder of her illegitimate child (born before the marriage) by neglecting to feed it properly (*k*). Alderson, B., disposed of the case by directing the jury that the wife was the servant of her husband; that the question of duty did not at all turn upon the natural relationship of the mother; that the indictment could be supported only by showing that the husband supplied her with food, which she wilfully neglected to give to the

(*a*) *R. v. Friend*, R. & R. 20 (1802).

(*b*) See now Children Act, 1908, ss. 12 and 38 (2); et vide Russ., 671, note (*a*).

(*c*) Poor Law Amendment Act, 1834, s. 41.

(*d*) *Ib.*, s. 57; *R. v. Saunders*, 7 C. & P. 277 (1836).

(*e*) *Liverpool Soc. P. C. C. v. Jones*, 30 T. L. R. 584 (1914).

(*f*) *Ib.*, s. 12; *R. v. Mabbett*, 5 Cox, 339 (1851); *R. v. Jones*, 19 id. 678 (1901).

(*g*) Offences Against the Person Act, 1861, s. 26.

(*h*) Lunacy Act, 1890, s. 322; vide *R. v. Pelham*, 8 Q. B. 959 (1846); *R. v. Hill*, 50 J. P. 137; *Dent's Case*, Rent. 682 (1874); Mental Deficiency Act, 1913, s. 55.

(*i*) *R. v. Smith*, L. & C. 607 (vide post, Chap. XII.), per Erle, J.; cf. *R. v. Edwards*, *ub. sup.*, per Patteson, J. (1838).

(*k*) Cf. *R. v. Petch*, 2 Cr. A. R. 71 (1909).

child ; and that the omission to provide food was the omission of the husband (*l*).

Whether a husband is bound to provide shelter for his wife, from whom he is separated, is a question which would have been reserved, had the jury not acquitted the prisoner of manslaughter, in a case where the helplessness of the wife seems to have been taken for granted, although it appeared that she had no difficulty in supplying herself with more drink than was good for her. The parties were living separately by mutual agreement, the husband making an allowance, to his drunken wife, of half a crown per week. She applied to him for shelter one night, but he shut her out ; the next night he paid for a bed for her, and on the following day she died. Gurney, B., directed the jury as follows :—

That there was no ground for any charge against the prisoner, for having caused the deceased's death by want of food, as he had regularly paid her an allowance, and might have been compelled to pay a larger sum if that had not been sufficient. Under ordinary circumstances, he might have refused to have anything to do with her, but when she was ill and without shelter, on a cold and wet night, the question assumed a different aspect, and it was, whether they could certainly conclude that his refusal to give her shelter at that time had the effect of causing her death to occur sooner than in the ordinary course of nature (*m*).

At any rate, separation from the wife affords no defence to the husband for neglecting his children, and he is criminally liable for her neglect of them, if he is aware of it, even although he may have supplied her with enough money for their support (*n*).

At common law, it was doubtful whether the legal obligation of parents towards their children extended to the provision of skilled medical attendance ; and for that reason there were conflicting decisions as to the liability of a man for manslaughter, when his neglect to provide such attendance caused or accelerated the death of his child.

Upon a trial at the Old Bailey, it was held that there was such a liability (*o*) ; but in another case, where from conscientious religious conviction the parents of a sick child refused to call in medical assistance,

(*l*) *R. v. Saunders*, 7 C. & P. 277 (1836) ; cf. *R. v. Bubb and Hook*, 4 Cox, 455 (1850).

(*m*) *R. v. Plummer*, 1 C. & K. 600 (1844).

(*n*) *Poole v. Stokes*, 78 J. P. 231 (1914).

(*o*) *R. v. Hurry*, 76 O. B. Sns. Prs. 63 ; coram Byles, J. (1872).

though well able to afford it, and the child died in consequence, Wills, J., held that there was no culpable homicide, inasmuch as the parents had done what they thought the best thing for the child, and had given it the best of food. The jury therefore brought in an acquittal (p).

In view of the doubts entertained on the matter, it was provided by the Poor Law Amendment Act, 1868 (q), that any parent wilfully neglecting to provide medical aid for his child, thereby endangering its health, should be guilty of an offence.

Under this statute there was no room for doubt as to liability for manslaughter in such cases, and it was held that members of the sect called "Peculiar People," who entertain conscientious objections to the preservation of human life by medical aid, were not on that account privileged in respect of the commission of manslaughter by neglect (r), although there could of course be no conviction of the crime where the evidence failed to show that the neglect had actually caused or accelerated the death (s).

On the repeal (t) of this enactment, however, the necessity of avoiding any doubt on the point was apparently lost sight of, and the Prevention of Cruelty to Children Act, 1894, omitted any express reference to medical aid, merely providing generally that it should be a misdemeanour wilfully to neglect any child in a manner likely to cause it unnecessary suffering or injury to its health (u). This wording was sufficiently vague to enable the old doubt to be revived in *R. v. Senior* (x), where, again, a "Peculiar" person was charged with, and this time convicted of, the manslaughter of his infant child by wilful neglect to provide medical aid and medicine. Upon a case reserved, the conviction was upheld, on the ground that there was sufficient evidence of wilful neglect within the meaning of the statute, Lord Russell, C.J., observing that—

"Neglect is the want of reasonable care—that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the

(p) *R. v. Wagstaffe*, 10 Cox, 530 (1868); cf. *R. v. Hines*, 80 O. B. Sns. Prs. 309, per Piggott, B. (1874); *R. v. Downes*, 1 Q. B. D. 25, per Coleridge, L.C.J., and Bramwell, B. (1875); *R. v. Senior*, 1899, 1 Q. B. 283, per Russell, L.C.J., and Wills, J.

(q) 31 & 32 Vict. c. 122, s. 37.

(r) *R. v. Downes*, *ub. sup.*

(s) *R. v. Morby*, 8 Q. B. D. 571 (1882).

(t) By 52 & 53 Vict. c. 44, s. 18, afterwards repealed by 57 & 58 Vict. c. 41, s. 23 (2).

(u) 57 & 58 Vict. c. 41, s. 1.

(x) 1899, 1 Q. B. 283.

ordinary experience of mankind—that is, in such a case as the present, provided the parent had such means as would enable him to take the necessary steps. I agree with the statement in the summing-up, that the standard of neglect varied as time went on, and that many things might legitimately be looked upon as evidence of neglect in one generation, which would not have been thought so in a preceding generation, and that regard must be had to the habits and thoughts of the time. At the present day, when medical aid is within the reach of the humblest and poorest members of the community, it cannot reasonably be suggested that the omission to provide medical aid for a dying child does not amount to neglect.”

By the Children Act, 1908, any possibility of doubt is again removed, it being expressly provided that—

“A parent or other person legally liable to maintain a child or young person shall be deemed to have neglected him in a manner likely to cause injury to his health if he fails to provide adequate food, clothing, medical aid, or lodging for the child or young person, or if, being unable otherwise to provide such food, clothing, medical aid or lodging, he fails to take steps to procure the same to be provided under the Acts relating to the relief of the poor” (y).

The duty of providing medical aid has also been imposed upon masters for the protection of their servants and apprentices (z).

Although there is no general duty upon parents to procure midwives for their daughters of child-bearing age (a), their responsibility at common law is sufficiently wide to impose upon a mother the necessity of doing all that may be requisite and possible to preserve the life of her own newly-born child.

A woman who, being delivered of a live child by the roadside, took no proper steps in its behalf, gave it no food or clothing, and left it there, where it was afterwards found dead, was indicted for murder, but convicted of manslaughter only. *Coltman, J.*, in summing up, said :—

“If a party do an act with regard to a human being helpless and unable to provide for itself, which must necessarily lead to its death,

(y) 8 Edw. 7, c. 67, s. 12 (1); vide *Oakey v. Jackson*, 78 J. P. 87 (1913), as to surgical operations.

(z) Offences Against the Person Act, 1861, s. 26; Conspiracy and Protection of Property Act, 1875, s. 6; vide *R. v. Smith*, 8 C. & P. 153 (1837); *R. v. Davies* Russ. 669 (1831); *R. v. Crumpton*, C. & M. 597 (1842).

(a) *R. v. Shepherd*, 9 Cox, 123 (1862).

the crime amounts to murder. But if the circumstances are not such, that the party must have been aware that the result would be death, that would reduce the offence to the crime of manslaughter, provided the death was occasioned by an unlawful act, but not such as to imply a malicious mind. . . . This is a sort of intermediate case, because the child is exposed on a public road, where persons not only might pass, but were passing at the time; and you will therefore consider whether the prisoner had reasonable ground for believing that the child would be found and preserved" (b).

The positive duty to preserve the life of one's child commences, however, only after its complete birth; and therefore the omission, by a person expecting to become a parent, to take proper precautions before or at the time of the birth, if such omission be unaccompanied by any positive act of recklessness (c), and be not followed by either active or passive homicidal negligence after the birth, will not constitute either murder or manslaughter (d).

The law on this point was somewhat elaborately defined, in *R. v. Handley* (e), by Brett, J., who laid it down to the jury, upon an indictment for murder, that a woman is guilty of the capital crime if, either before or after the birth of her child, she makes up her mind that it shall die, and, the child being born alive, she leaves it to die with that intent, and it dies in consequence. She is also guilty of murder if, without intending murder, she resolves to conceal the birth by methods which will probably end in its death, and do so end:—

"But supposing that the prisoner had not made up her mind that the child should die, yet had determined that none but herself should be present at its birth, without intending final concealment, but only for the purpose of hiding her shame for a time, and had to that intent delivered herself, she would, in the eye of the law, have invested herself with a responsibility from the moment of birth, viz., that of the care and charge of a helpless creature; and if, after having assumed such care and charge, she allowed the child subsequently to die from her wicked negligence, that would make her guilty of manslaughter."

Apart from the foregoing responsibilities of parents, masters and

(b) *R. v. Walters*, C. & M. 164 (1841).

(c) Vide *R. v. West*, *post*, Chap. IX.

(d) *R. v. Knights*, 2 F. & F. 46 (1860); *R. v. Izod*, 20 Cox, 690 (1904), per Channell, J.

(e) 13 Cox, 79 (1874); cf. *R. v. Pritchard*, 17 T. L. R. 310 (1901).

others at common law and under various statutes for the protection of helpless persons, there is no general rule of law directly prescribing the performance of acts for the preservation of human life, the non-performance whereof would amount to homicide.

In any case, therefore, not covered by the special duties above referred to, an indictment for homicide must be grounded upon something more than mere omission of duty. The omission must be coupled with an act or acts preceding it, so as to constitute a complex act characterised by such gross disregard for human life as to bring the case within the rules as to manslaughter by active negligence.

If a surgeon or physician has a critical case to attend to, he must not go hunting or fishing instead (*f*). If he does, and his neglected patient dies, he is guilty of manslaughter, not by the mere omission, but by the assumption of a responsibility and the subsequent omission amounting to non-fulfilment thereof.

For a precisely similar reason—

“If a grown-up person chooses to undertake the charge of a human creature helpless either from infancy, simplicity, lunacy or any other infirmity, he is bound to execute that charge, without (at all events) wicked negligence” (*g*).

So, where a man was indicted for murder (but convicted only of manslaughter) by neglect of an elderly and infirm woman, whom he had taken to live in his house, promising to make her happy and comfortable, Patteson, J., said :—

“The cases which have happened of this description have been generally cases of children and servants, where the duty was apparent. This is not such a case ; but it will be for you to say whether, from the way in which the prisoner treated her, he had not by way of contract, in some way or other, taken upon him the performance of that duty which she, from age and infirmity, was incapable of doing. . . . This is evidence on which you are called upon to infer that the prisoner undertook to provide the deceased with necessaries, and though, if he broke that contract, he might not be liable to be indicted during her life, yet if by his negligence her death was occasioned, then he becomes criminally responsible” (*h*).

(*f*) *R. v. Markuss*, 4 F. & F. 356 ; *ante*, Chap. VII.

(*g*) *R. v. Nicholls*, 13 Cox, 75 (1874), per Brett, J.

(*h*) *R. v. Marriott*, 8 C. & P. 425 (1838).

A woman was convicted of manslaughter by neglect of her aunt, an aged woman with whom she lived, and upon whose means she was dependent. No one else lived with them. For the last ten days of her life the deceased was prevented by gangrene of the leg from doing anything for herself, or procuring assistance. The prisoner took the food from the tradesmen, but apparently gave none to the deceased; nor did she procure medical attendance, etc., for her, or inform anybody as to her condition, though she had abundant opportunity for so doing. No one but the prisoner knew of the deceased's condition until her death. Upon a case stated, the conviction was upheld, Lord Coleridge, C.J., saying :—

“ We are all of opinion that this conviction must be affirmed. It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation. A legal common law duty is nothing else than the enforcing by law of that which is a moral obligation without legal enforcement. There can be no question in this case that it was the clear duty of the prisoner to impart to the deceased so much as was necessary to sustain life of the food which she from time to time took in, and which was paid for by the and deceased's own money, for the purpose of the maintenance of herself the prisoner. . . . The prisoner was under a moral obligation to the deceased, from which arose a legal duty towards her; that legal duty the prisoner has wilfully and deliberately left unperformed, with the consequence that there has been an acceleration of the death of the deceased, owing to the non-performance of that legal duty ” (i).

This judgment lays down the law, in an apparently arbitrary manner, without giving any satisfactory explanation of it. If moral and legal duty do often, or even generally, coincide, it is by happy chance, rather than by skilful design on the part either of legislators or of the dictators of morality. There is no principle of English law, or of any other system of jurisprudence, whereby moral obligation can be accepted as a criterion of legal duty. Although in *R. v. Instan* “ the prisoner was under a moral obligation to the deceased, from which arose a legal duty towards her,” it is to be observed that the legal duty was by no means co-extensive with the moral one. The moral obligation incumbent on the prisoner was to secure to her unfortunate relative the utmost comfort and happiness that her ailment and circumstances would

(i) *R. v. Instan*, 1893, 1 Q. B. 450.

permit; the legal duty was merely to do what might be absolutely necessary to keep the breath of life in her body.

The law, enforced in this and the other cases above referred to, is justified by a much better reason than that given by Lord Coleridge. It rests upon the wide principle of liability for active homicidal negligence, examined in the preceding chapter, and ought to be carefully distinguished from the exceptional liability of parents and others, which arises solely out of an omission to perform a positive duty imposed by law.

The same principle, of liability for active conduct followed by omission connected therewith, also accounts for various convictions of manslaughter where, under entirely different circumstances, responsibility for the safety of others has been assumed, by virtue of contracts or undertakings of various kinds. It does not depend upon the existence of a civil contract, under which damages could be obtained; the promise may be *nudum pactum*, or even something less definite than that.

The criminal liability is based upon this wide principle—that if, by promising or engaging to bestow care upon a particular matter or in favour of a particular person, a man voluntarily assumes responsibility for the life of another, and if he afterwards neglects to carry out what he has expressly or impliedly undertaken, a fatality resulting from such negligence is imputable to him, according to the actual or presumed degree of his intentionality, as being caused by a complex homicidal act (or course of conduct) on his part.

The captain and pilot of a steamboat were both indicted for the manslaughter of a person on board of a smack which was run down by their vessel. The running down was attributed by the prosecution to improper steering of the steamboat, arising from there being nobody at the bow to keep a look-out. There was some contradiction in the evidence, as to whether both the defendants were on the bridge, or whether the pilot was alone, and other matters. There having been, however, no act of personal misconduct or personal negligence on the part of either of them, Alderson, B., directed an acquittal, saying that there could be no felony, and Park, J., concurred with him, remarking that “a captain cannot be personally active himself for the whole twenty-four hours” (*k*).

(*k*) *R. v. Allen and Clarke*, 7 C. & P. 153 (1835).

Before the same judges,† the captain of another vessel was indicted upon a similar charge, arising out of the running down, by pure accident, of a small boat. They directed an acquittal, the evidence showing that every possible precaution had been taken. In the course of the argument, Park, B., said :—

“ You must show some act done. You rather state it as if a mere omission on the part of the prisoner, in not doing the whole of his duty, would be enough ; and we are of opinion that is not sufficient. . . . I have no hesitation in saying that if there was sufficient light, and the captain himself was at the helm, or in a situation to be giving the command, and did that which caused the accident, he would be guilty of manslaughter.”

Alderson, B., remarked :—

“ There must be some personal act. In the case of a coach, the coachman is driving animals ; and in the case of a captain, he is governing reasonable beings ” (l).

The meaning of these observations is somewhat obscure, but they do not seem to amount to a denial of the obvious fact that a captain or pilot may be liable for manslaughter by negligent omission, as well as for manslaughter by negligence in act. The lazy navigator, who lies in his bunk at the wrong time, is at least as fully responsible for the consequences as the drunken navigator, who commits a blunder at the wrong moment.

When it is said that there must be a personal act, the meaning apparently is that the prosecution must trace the fatality to an omission, not merely to do what might possibly have been done, but to do what the prisoner ought to have done, in accordance with the duty previously assumed by him.

An engineer, in charge of a pumping engine which kept up a supply of pure air in a mine, neglected his duty by absenting himself for three days, so that the engine stopped, and the mine became charged with foul air. An explosion took place, and caused the death of a miner entering the mine with a lighted candle. Wightman, J., observed that the indictment contained no direct allegation that it was the duty of the prisoner to do that which he was alleged to have neglected to do ; and accordingly the prisoner was acquitted (m).

(l) *R. v. Green*, ib. 156 (1835).

(m) *R. v. Barrett*, 2 C. & K. 343 (1846).

In a somewhat similar case it was alleged to be the duty of the prisoner, who was ground bailiff of a mine, to regulate the ventilation, and direct where air-headings should be placed. This he had omitted to do, and Maule, J., directed the jury, who acquitted the prisoner, as follows :—

“ If you are satisfied that it was the ordinary and plain duty of the prisoner to have caused an air-heading to be made in this mine, and that a man using reasonable diligence would have had it done, and that, by the omission, the death of the deceased occurred, you ought to find the prisoner guilty of manslaughter.

“ It has been contended that some other persons were, on this occasion, also guilty of neglect. Still, assuming that to be so, their neglect will not excuse the prisoner ; for, if a person’s death be occasioned by the neglect of several, they are all guilty of manslaughter ; and it is no defence for one who is negligent to say that another was negligent also, and thus, as it were, to divide the negligence among them ” (n).

Another engineer, employed to manage a steam-engine used to draw up miners from a coal-pit, left the machine in charge of an ignorant boy, who protested to him that he was unable to manage it. During his absence a man was killed in consequence of the boy’s want of skill. Huddleston, for the prisoner, contended that a mere omission or neglect of duty could not render a man guilty of manslaughter, and cited *R. v. Allen* and *R. v. Green (o)*. Lord Campbell, C.J., however, expressed himself as clearly of opinion “ that a man may, by neglect of duty, render himself liable to be convicted of manslaughter, or even of murder,” and under his direction the jury found the prisoner guilty of the former offence (p).

In another case, the deceased man was employed with others in walling the inside of a new shaft in a colliery. The prisoner was banksman, at the top of the shaft, and it was his duty to send down materials in buckets. For this purpose the buckets were run, in a truck, on to a movable stage over one half of the area of the top of the shaft ; and then a bucket would be attached and lowered down. The prisoner’s duty was to withdraw and replace the stage at the right times ; but on the occasion in question he omitted to put, or cause to be put, the

(n) *R. v. Haines*, ib. 368 (1847).

(o) *Supra*.

(p) *R. v. Lowe*, 3 C. & K. 123 (1850).

stage on the mouth of the shaft, with the result that a truck ran into, and fell down, the shaft, killing the deceased. The jury found that the death arose from this negligent omission on the part of the prisoner, and convicted him of manslaughter. The conviction was affirmed, and Lord Campbell, C.J., said :—

“It was the duty of the prisoner to place the stage on the mouth of the shaft; the death of the deceased was the direct consequence of the omission of the prisoner to perform this duty. If the prisoner, with malice aforethought, and with the premeditated design of causing the death of the deceased, had omitted to place the stage on the mouth of the shaft, and the death of the deceased had thereby been caused, the prisoner would have been guilty of murder. . . . The general doctrine seems well established, that what constitutes murder, being by design and of malice prepense, constitutes manslaughter when arising from culpable negligence” (q).

In *R. v. Pocock* (r) certain persons, holding the office of highway trustees under a local Act, were charged with manslaughter, upon a coroner’s inquisition alleging that they did feloniously neglect to repair, or contract for the reparation of, a certain road, whereby it became ruinous, and a man driving along the road was killed. The inquisition was quashed by the Court of Queen’s Bench, Lord Campbell, C.J., saying :—

“No doubt the neglect of a personal duty, when death ensues as the consequence of such neglect, renders the party guilty of it liable to an indictment for manslaughter; and the cases which have been cited in the course of the argument, and which establish that doctrine, are good law. . . . But how can the principle I have stated apply to that case? It cannot be said that the trustees are guilty of felony in neglecting to contract. Not only must the neglect, to make the party guilty of it liable to the charge of felony, be personal, but the death must be the immediate result of that personal neglect. According to the argument here, it might be said that where the inhabitants generally are bound to repair, and a death is caused as in the present case, all the inhabitants are indictable for manslaughter.”

(q) *R. v. Hughes*, D. & B. 248 (1857).

(r) 17 Q. B. 34 (1851).

CHAPTER IX.

CONSTRUCTIVE CRIME.

CONSTRUCTIVE crime may be defined as existing wherever, by reason of the prisoner's having been engaged in some unlawful conduct other than the actual crime charged in the indictment against him, intention of a particular consequence is by law imputed to him in a higher degree than such intention (if any) as he actually entertained with regard to that consequence.

It arises, or has been thought to arise, in either of two ways :—

(1) There may, according to the older authorities, be constructive murder in the course of a felony, or constructive manslaughter in the course of any other gravely unlawful act, without any homicidal intention whatever, and in the absence of any culpable disregard for human life.

(2) There may be constructive murder, in the course of a felony, where the homicidal act would, under the ordinary principles of intentionality or excuse, have amounted only to manslaughter (a).

As an example of the former, and more startling, of these two applications, may be instanced the verdict of *felo de se* returned at a coroner's inquest upon a burglar who was found to have feloniously killed himself without intending so to do, by accidentally falling into the cellar of a house broken into by him. The coroner directed the jury that if a man, while committing a felony, injured another person so as to cause death, he would be guilty of murder ; and if in the perpetration of a felony he injured himself fatally, he was guilty of self-murder (b).

One can hardly conceive a better *reductio ad absurdum* of constructive crime than the commission of suicide *lucri causa*, by pure accident.

An example of the other application of the doctrine, whereby the

(a) For a theory of the origin and early growth of the doctrine of constructive homicide, vide art. "Some Points on the Law of Murder," 67 J. P. N., pp. 519, 530.

(b) 126 L. T. N. 60 (1908) ; cf. *Bourdin's Case*, 29 L. J. N. 143 (1894), 1 Hale, 412 ; 1 Hawk. c. 27, s. 4 ; and *R. v. Hopwood*, 8 Cr. A. R. 140 (1913).

guilt of murder is attached to conduct which would otherwise amount to manslaughter only, arose out of another burglary, giving rise to an indictment for murder. The deceased woman was found, tied hand and foot, and gagged with something which had been forced into her throat, and had caused her death by suffocation. There was circumstantial evidence tending to identify the prisoner as one of two persons engaged in the burglary; and the jury were directed by Blackburn, J., as follows :—

“ You will hardly have a doubt here that a murder has been committed by someone. As matter of law, if you are satisfied that the deceased met her death from violence by any person or persons to enable them to commit a burglary (or any other felony) although those who inflicted that degree of violence might not have intended to kill her (probably you think so here, and merely to stop her outcry in calling for assistance), all who are parties to that violence are guilty of murder. You need not take on yourselves the responsibility of that. I take that on myself.”

The jury, however, relieved his Lordship and themselves of any responsibility whatever by acquitting the prisoner (c).

Now, apart from the doctrine of constructive crime, there could hardly be a conviction of murder in such a case. The very fact of binding and gagging the woman would tend to negative full homicidal intent; because if the prisoner had fully intended the woman's death, or been utterly regardless of her life, it would have been simpler and safer to kill her more expeditiously. The correct verdict, under the ordinary doctrine of intentionality, would have been, at the worst, involuntary manslaughter; and the case is therefore a clear authority for the doctrine of constructive murder, whereby a conviction of the capital crime would have been justified solely by the unlawfulness of the occasion.

The principle of constructive homicide, if accepted in its widest form, may be shortly stated to be that the *mens rea* necessary to support a conviction of murder or manslaughter, need not consist of any form of homicidal intentionality, but may be a culpable intent to commit some other crime, which other crime need not even be an offence against the person; provided that—

(c) *R. v. Franz*, 2 F. & F. 580 (1861); et vide *R. v. Lee*, 4 id. 63, per Pollock, C.B. (1864).

(a) To support a conviction of constructive murder, the *mens rea* must have been felonious; and—

(b) To support a conviction of manslaughter, the *mens rea* must have referred to a heinous crime, as to which, however, the requisite degree of gravity has never yet been judicially defined.

Cases falling within this doctrine bear some resemblance to those where intention is imputed to a person (though not actually entertained) by virtue of various common law presumptions, whereby *mens rea* is deemed to exist whether actually existing or not.

The resemblance is, however, only partial; because, in constructive crime, there is always actual *mens rea*, though it refers to a crime other than that charged in the indictment.

It is one thing to convict a man of murder when, *e.g.*, under a misconception of the law (*d*), he thought his act to be entirely innocent and justifiable; and another thing to convict him of murder when he knew his conduct to be criminal, though he intended to commit merely a comparatively harmless arson, or a rape.

However harsh may be the principle of constructive crime, it forms no departure from the principle of intentionality; and even if it were applied generally to all offences, it would amount to no more than an artificial aggravation of actual guilt.

For example, a man, after fighting with some others, throws a stone at them, intending to do one of them a personal injury; but the stone misses them and smashes a plate glass window, which the prisoner did not know to be there; and the jury find specially that he in no degree intended that result, and was not guilty of any culpable recklessness in regard thereto. Can he be convicted of malicious damage to property?

There was certainly *mens rea*; because it is a crime to throw stones at people with intent to injure them. But the offence to which the *mens rea* refers is entirely distinct from the offence which (if we apply the doctrine of constructive crime) is accomplished. The two crimes differ, not only in gravity, but in kind. If such an offender were punishable as for the offence of malicious damage, the law would be capable of justification on the ground that there was *mens rea*, though

(*d*) *R. v. Smith*, Russ. 764 (*ante*, Chap. VII.); *R. v. Dudley and Stephens*, 14 Q. B. D. 273 (*post*, Chap. XI.).²

not an intent of the precise mischief ensuing. But such a law would be open to objection, as administering punishment in a manner dependent, not upon the degree of actual culpability of the offender, but upon fortuitous circumstances.

In the case supposed, there would be no serious hardship; because the crime accomplished would be of less gravity than the crime attempted and of no greater gravity than the attempt itself (e). But in other cases the converse might result; and then the law would be putting a man upon his peril (as regards unforeseen and grave consequences of a venial act) where no particular object would be served by so doing; it would be making punishment depend in principle, as indeed it used to depend generally in the old days, and too often does now in practice, more upon chance than upon culpability.

The facts of the case above supposed are those actually adjudicated upon in *R. v. Pembliton* (f), where it was held upon a case reserved that the prisoner could not be convicted of unlawful and malicious damage to property; and Lord Coleridge, C.J., observed:—

“What is intended by the statute is a wilful doing of an intentional act. Without saying that if the case had been left to them in a different way the conviction could not have been supported, if on these facts the jury had come to the conclusion that the prisoner was reckless of his act, and might reasonably have expected that it would result in breaking the window, it is sufficient to say that the jury have expressly found the contrary. . . . I do not say anything to throw doubt on the rule under the common law in cases of murder, which has been referred to, but the principles laid down in such cases have no application to the statutable offence we have to consider.”

In short, it may be stated with tolerable certainty that the doctrine of constructive crime is applicable only where the offence charged is murder or manslaughter. It has never been either actually applied or judicially stated to be applicable to any other crime; and, the modern tendency being unmistakably to restrict, if not to disregard, it, there is little likelihood of any attempt being made in the future to extend its operation to other offences than homicide (g).

(e) Offences Against the Person Act, 1861, s. 20; Malicious Damage Act, 1861 s. 51.

(f) L. R. 2 C. C. R. 119 (1874).

(g) Vide *R. v. Faulkner*, 13 Cox, 550; Ken. S. C. 152 (1877).

It is curious that such a harsh anomaly as the doctrine of constructive crime should be confined to that particular case where its application is calculated to work the greatest possible hardship, involving, upon a charge of murder, the infliction of the capital sentence for a mere attempt to commit a felony less than homicide.

The doctrine of constructive homicide was expounded by Coke as one already established in his time, and as having the effect of attaching the full guilt of murder to "homicide that is neither forethought nor voluntary" :—

"If the act be unlawful, it is murder. As if A., meaning to steal a deer in the park of B., shooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in a bush : this is murder ^(h) ; for that the act was unlawful ; although A. had no intent to hurt the boy, nor knew not of him. But if B., the owner of the park, had shot at his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide by misadventure, and no felony.

"So, if one shoot at any wild fowl upon a tree, and the arrow killeth any reasonable creature afar off, without any evil intent in him, this is *per infortunium*, for it was not unlawful to shoot at the wild fowl : but if he had shot at a cock or hen, or any tame fowl of another man's, and the arrow by mischance had killed a man, this had been murder, for the act was unlawful" ⁽ⁱ⁾.

This passage, however, was judicially condemned (*obiter*) by Holt, C.J., as "too large" ; and, according to that authority, must be read as subject to the important qualification that—

"There must be design of mischief to the person, or to commit a felony, or great riot" ^(k).

Lord Hale was equally explicit, but less extreme than his great predecessor, in his statement of the doctrine ; for he speaks of it merely as rendering felonious what would otherwise amount to homicide *per infortunium* ; and does not pronounce an opinion on the extreme example of wilful murder by accident, suggested by Coke :—

"If a man do *ex intentione* and voluntarily an unlawful act tending to bodily hurt of any person, is by striking or beating him, though he

(h) Vide Fost. 258, contra.

(i) Co. Inst., III., 56.

(k) *R. v. Keate*, Comb. 406 (1697).

did not intend to kill him, but the death of the party struck doth follow thereby within the year and day ; or, if he strike at one, and missing him kills another, whom he did not intend, this is felony and homicide, and not casualty or *per infortunium*.

" *So it is if he be doing an unlawful act, though not intending bodily harm of any person*, as, throwing a stone at another's horse, if it hit a person and kill him, this is felony and homicide, and not *per infortunium* ; for the act was voluntary, though the event not intended ; and therefore, the act itself being unlawful, he is criminally guilty of the consequence that follows " (l).

In construing the words above italicised, we must bear in mind the ambiguity of the word *intending*. Sometimes it denotes full or complete intention ; sometimes it is satisfied by any slight degree of expectation or advertence ; and there is yet a third sense, in which it may be taken to signify such a degree of intention as would (according to the ordinary doctrines of imputability) justify a jury in finding a conviction of the particular crime charged.

The hitting a bystander with a stone aimed at a man's horse would usually involve some amount of recklessness to life and limb ; and it seems quite possible to construe Hale's doctrine, so illustrated, as amounting to no more than this : that in trials for manslaughter, where the prisoner's conduct was intrinsically unlawful, and where there was some, though only a slight, reason for him to anticipate danger to human life or limb, the jury ought to be less indulgent in assessing the amount of intention evinced, and to convict more readily, than if the act done were (apart from such risk as there might be) lawful.

The like construction may be put upon another passage of the same authority, which, however, gives rise to a difficulty of another kind :—

" If A., without the license of B., hunts in the park of B., and his arrow glancing from a tree killeth a by-stander, to whom he intended no hurt, this is manslaughter (*m*), because the act was unlawful. So, if A. throws a stone at a bird, and the stone striketh and killeth another, to whom he intended no harm, it is *per infortunium*. But if A. had thrown a stone to kill the poultry or cattle of B., and the stone hit and kill a by-stander, it is manslaughter (*m*), because the act was unlawful ; but not murder, because he did it not maliciously, or with an intent to hurt the by-stander.

(l) Hale, I., 38.

(m) Cf. Co. Inst. III., 56, *supra*.

"By the statute (n), no person not having lands, etc. of the yearly value of £100 per annum may keep or shoot in a gun, upon pain of forfeiture of £10. Suppose, therefore, such a person not qualified shoots with a gun at a bird, or at crows, and by mischance it kills a by-stander, by the heating of the gun or some other accident, that in another case would have amounted only to chance medley, this will be no more than chance medley in him, for though the statute prohibits him to keep or use a gun, yet the same was but *malum prohibitum*, and that only under a penalty, and will not enhance the effect beyond its nature" (o).

The distinction between *malum prohibitum* and *malum in se* has long since been exploded; and with it has disappeared any possibility of relying upon, or making any sense out of, the distinctions drawn by Hale as to where the doctrine of constructive homicide may or may not be applied.

Neither Coke nor Hale afford any support to the important distinction, which has been drawn by more modern writers, between a felonious intent, involving the guilt of murder, and an intent unlawful but not felonious, involving that of manslaughter only. This refinement may have been added by Hawkins, who certainly tried to improve upon Hale's definition of the doctrine, but made no better sense of its limits and application; indeed he made the matter worse rather than better, by attempting to apply the theory of constructive crime to all felonies; for which he appears to have had no authority whatever:—

"And if a man happen to kill another in the execution of a mischievous and deliberate purpose to do him a personal hurt, by wounding or beating him; or in the wilful commission of an unlawful act, which necessarily tends to raise tumults and quarrels, and consequently cannot but be attended with the danger of personal hurt to someone or other; as by committing a riot, robbing a park, etc., he shall be adjudged guilty of murder.

"And *à fortiori* he shall come under the same construction who in the pursuance of a deliberate intention to commit a felony chances to kill a man, as by shooting at tame fowl, with an intent to steal them, etc. (p), for such persons are by no means favoured, and they must at their peril take care of the consequences of their actions; and it is a general rule, that wherever a man intending to commit one felony happens

(n) 33 Hen. 8, c. 6.

(o) Hale, I., 475

(p) Cf. per Holt, L.C.J., *R. v. Plummer*, Kel. 109 (1700), and *R. v. Desmond*, 11 Cox, 146 (1868), per Cockburn, L.C.J. (vide Times N., April 28).

to commit another, he is as much guilty as if he had intended the felony which he actually commits" (q).

Foster substantially reproduces these propositions, but pushes one example to the limits of extravagance by making a man's life depend not so much upon the intention, as upon the motive with which he aims destruction at his neighbour's hens :—

"A. shooteth at the poultry of B., and by accident killeth a man; if his intention was to steal the poultry, which must be collected from circumstances, it will be murder, by reason of that felonious intent; but if it was done wantonly, and without that intention, it will be barely manslaughter" (r).

One can hardly suppose, at the present day, that the mere wantonness or indiscretion of trespassing in pursuit of game, or throwing a stone at poultry, could, in the absence of any degree of homicidal intention or culpable recklessness to human life, alter the nature of the act from the innocence of misadventure to the guilt of manslaughter. Still less reliable is the distinction between a wanton fowl-killing intention, which would make the act manslaughter, and a felonious poultry-stealing "intention" (or motive) which would make it murder.

With regard to wanton acts amounting to mere torts, and not in themselves punishable offences, the law is now clear, the case of *R. v. Franklin* (s) having decided that there is no constructive manslaughter where the act done is unlawful merely in the sense of amounting to a civil injury. The prisoner wrongfully took up a good-sized box from a refreshment stall on a sea pier, and wantonly threw it into the sea, thereby unintentionally causing the death of a person who was bathing. It was held that this was not, *per se*, and apart from the question of negligence, sufficient to constitute manslaughter, and Field, J., said :—

"I am of opinion that the case must go to the jury upon the broad ground of negligence, and not upon the narrow ground proposed by the learned counsel; because it seems to me that the mere fact of a civil wrong committed by one person against another ought not to be used as an incident which is a necessary step in a criminal case (t). I have a great abhorrence of constructive crime."

(q) Hawk., I., c. 29, ss. 10, 11; *sed vide* *h. v. Pembilton*, *contra* (*supra*).

(r) *Fost.* 258.

(s) 15 Cox, 163 (1883).

(t) *Sed cf. R. v. Prince*, *ante*, Chap. II.

Upon the question of negligence being put to the jury, however, they convicted the prisoner.

When the species of minor crimes and offences were fewer in number, and when acts resulting in death or mayhem were more harshly dealt with, the examples given and distinctions drawn by the old writers may have had some practical meaning; but at the present day their chief value is to show that the doctrine of constructive murder and manslaughter has at all times been subject to a narrow, though ill-defined, interpretation.

Stephen, J., once committed himself so far as to tell a jury that the phrase *constructive murder* "has no legal meaning whatever"; and that, in cases where it has been supposed to exist, there must be wilful murder "according to the plain meaning of the term," or else no murder at all (u). He took good care to explain away this surprising statement, by adding that the words *malice aforethought* in the definition of murder are technical, and cannot be construed by ordinary rules of language; and that one of their technical meanings is "the killing of another person by an act done with intent to commit a felony" (x).

Language can always be twisted to mean anything at all, or nothing whatever. To say that there can be wilful murder "according to the plain meaning of the term," where the prisoner never entertained the slightest degree of homicidal intention, savours rather of legal subtlety than of common sense.

In the case just referred to, the prisoners were indicted for the murder of a boy, by wilfully setting fire to a house and shop in the Strand. After defining wilful murder in the manner above described, Stephen, J., said :—

"I very much doubt whether the definition which I have given, although it is the common definition, is not somewhat too wide. Now when it is said that murder means killing a man by an act done in the commission of a felony, the mere words cover a case like this, that is to say, a case where a man gives another a push with an intention of stealing his watch, and the person so pushed, having a weak heart, or some other internal disorder, dies. To take another very old illustra-

(u) *R. v. Serné and Goldfinch*, 16 Cox, 311 (1887).

(x) Cf. per Lord Alverstone, C.J., Liverpool Assizes, March, 1909; vide Kenny, Outl., 137-8; et per Hawkins, J., *R. v. Culmore*, ib., Times N., August 9, 1880.

tion, it was said that if a man shot at a fowl with intent to steal it, and accidentally killed a man, he was to be accounted guilty of murder, because the act was done in the commission of a felony. I very much doubt, however, whether that is really the law or whether the Court for the Consideration of Crown Cases Reserved would hold it to be so. The present case, however, is not such as I have cited nor anything like them. In my opinion the definition of the law which makes it murder to kill by an act done in the commission of a felony might and ought to be narrowed, whilst that part of the law under which the Crown in this case claim to have proved a case of murder is maintained. I think that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death, done for the purpose of committing a felony, which caused death, should be murder. As an illustration of this, suppose that a man, intending to commit a rape upon a woman, but without the least wish to kill her, squeezed her by the throat to overpower her, and in so doing killed her, that would be murder. I think that everyone would say in a case like that, that where a person began doing wicked acts for his own base purposes, he risked his own life as well as others. That kind of crime does not differ in any serious degree from one committed by using a deadly weapon, such as a bludgeon, a pistol or a knife. If a man once begins attacking the human body in such a way, he must take the consequences if he goes further than he intended when he began. That I take to be the true meaning of the law on the subject.

"In the present case, gentlemen, you have a man sleeping in a house with his wife, his two daughters, his two sons and a servant; and you are asked to believe that this man, with all these people under his protection, deliberately set fire to the house in three or four different places, and thereby burnt two of them to death. It is alleged that he arranged matters in such a way that any person of the most common intelligence must have known perfectly well that he was placing all those people in deadly risk. It appears to me that if that were really done, it matters very little indeed whether the prisoners hoped the people would escape or whether they did not. . . . If Serné and Goldfinch set fire to this house when the family were in it, and if the boys were by that act stifled or burnt to death, then the prisoners are as much guilty of murder as if they had stabbed the children. I will also add, for my own part, that I think in so saying the law of England lays down a rule of broad, plain common sense."

Upon this direction, the prisoners were acquitted; but they were subsequently indicted for and convicted of arson, upon the same facts (*y*).

(*y*) *R. v. Serné and Goldfinch*, *ub. sup.*; cf. *Kenny*, *Outl.*, 137.

The confusion between intention and desire, into which Stephen, J., fell in the foregoing direction, detracts a good deal from the value of his attempt to supply a definition of the law of constructive murder reconcilable with modern ideas of justice.

There is a difference, too, in spite of Stephen, J.'s., suggestion to the contrary, between accidentally throttling a woman in the course of a rape and striking a deadly blow at a man with a weapon, with intent to do him grievous bodily harm.

If the law were indeed as above suggested, there would be no necessity for a doctrine of constructive murder, for the application of the supposed doctrine might well be restricted within the ordinary bounds of intentionality.

Stephen, J., was not the only judge who, confronted with the older statements of the doctrine of constructive homicide, has felt reluctant to give it a practical application, and has taken refuge in an ambiguous or evasive explanation of its effect. In *R. v. Greenwood* (z), the prisoner ravished a child under the age of ten years, who afterwards died, and the jury found that her death resulted from the prisoner's act, but were not agreed as to finding him guilty of murder. Wightman, J., told them that, under these circumstances, it was open to them to find the prisoner guilty of manslaughter (which they did) and that they might ignore the doctrine of constructive murder if they thought fit (a).

This again is virtually to repeal, or make of no effect, the doctrine in question, wherever (as would almost invariably be the case) the jury are inclined to view it with disfavour. The folly and danger of laying down a rule of law, and then telling the jury that they may apply or ignore it according to their own caprice, need hardly be insisted on at great length. Juries may usually be relied upon to save a man from the gallows, in the teeth of the law, wherever that may be feasible, without express instructions to break their oath.

In *R. v. Horsey* (b) the prisoner, indicted for the murder of a person unknown, had wilfully set fire to a stack of straw in a yard. Whilst

(z) 7 Cox, 404 (1857).

(a) Cf. *Ladd's Case*, Leach, 96 (1773).

(b) 3 F. & F. 287 (1862).

the fire was burning, the deceased was seen in the flames, but there was no evidence as to how or when he got there. Bramwell, B., told the jury that the law was, that where a prisoner, in the course of committing a felony, caused the death of a human being, that was murder, even though he did not intend it :—

“ And though that may appear unreasonable, yet as it is laid down as law it is one’s duty to act upon it. The law, however, is that a man is not answerable except for the natural and probable result of his own act ; and therefore, if you should not be satisfied that the deceased was in the enclosure *at the time the prisoner set fire to the stack* but came in afterwards, then, as his own act intervened between the death and the act of the prisoner, his death could not be the natural result of the prisoner’s act. And in that view, he ought to be acquitted of the present charge.”

This judgment seems to touch the high water mark of confused thinking. The whole importance of the doctrine of constructive homicide, if indeed it is allowed to have any importance at all in modern trials, lies in its making of no account any question of homicidal intentionality on the prisoner’s part, and in its substituting for homicidal intention any intention to commit a felony, actually committed or attempted by the prisoner, and in the course whereof the death charged against him was inflicted or caused, even by pure accident.

According to the doctrine of constructive homicide, any person endeavouring to procure abortion (c) would be guilty of wilful murder if a fatal result ensued (d), apart altogether from any question of homicidal intention or recklessness.

Thus, where a prisoner, charged with murder, had caused the premature delivery of a woman, by using an instrument for the purpose of procuring abortion, and a child being prematurely born was, in consequence of such premature birth, so weak that it died, Maule, J., said :—

“ This, no doubt, is an unusual mode of committing murder ; and some doubt has been suggested by the prisoner’s counsel, whether the prisoner’s conduct amounts to that offence ; but I am of opinion (and I direct you in point of law) that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time that it is born in a state much less capable of living, and

(c) 24 & 25 Vict. c. 100, s. 58.

(d) *R. v. Russell*, 1 Moo. 356 (1832) ; *sed. cf. R. v. Fretwell*, L. & C. 161 (1862).

afterwards dies in consequence of its exposure to the external world, the person who, by his misconduct, so brings the child into the world and puts it thereby into a situation in which it cannot live, is guilty of murder " (e).

Latterly, however, an entirely different view has been taken in such cases, and juries have been directed in the contrary sense.

Thus, in *R. v. Whitmarsh* (f), Bigham, J., told the jury that, if they were of opinion that the deceased woman died as the result of an unlawful operation by the prisoner, he was guilty of murder ; but if they should be of opinion that the prisoner could not, as a reasonable man, have expected death to result, they might find a verdict of manslaughter.

This direction was followed by Lawrance, J., upon the trial of an herbalist for murder in performing an illegal operation upon a girl eighteen years of age ; and the prisoner was convicted of manslaughter only (g).

Again, in a recent case, a physician who had been struck off the medical register was indicted for wilful murder, but convicted only of manslaughter, of a woman, by feloniously using an instrument upon her with intent to procure miscarriage ; and Avory, J., directed the jury as follows :—

" When he did that, did he contemplate or must he as a reasonable man have contemplated that death was likely to result ; or must he, as a reasonable man, have contemplated that grievous bodily harm was likely to result ? If, in your opinion, he must as a reasonable man have contemplated either of those consequences, then your duty is to find him guilty of murder. If you are of opinion, and are driven to the conclusion by the evidence, that he did the act which is charged against him, but that he had not at the time in contemplation, and would not as a reasonable man have contemplated, that either death or grievous bodily harm would result, but thought that by his own skill as a medical man he could perform this operation without any risk of either death or grievous bodily harm, then you would be justified in convicting him of manslaughter " (h).

From the foregoing decisions, it will be seen that in the few cases where it has been possible in recent years to apply the doctrine of

(e) *R. v. West*, 2 C. & K. 784 (1848).

(f) 62 J. P. 711 (1898).

(g) *R. v. Bottomley*, 38 L. J. N. 311 (1903).

(h) *R. v. Lumley*, 76 J. P. 208 ; 22 Cox, 635 (1912).

constructive crime to capital charges, it has been deliberately and almost invariably departed from, under high judicial authority.

It may, therefore, be concluded that the doctrine of constructive murder, which never rested upon any considerable judicial authority, is now discredited and obsolete, and, at any rate, cannot now be regarded as imposing upon felons a liability for wilful murder beyond the limits of actual homicidal intentionality.

The same remark applies to the doctrine of constructive manslaughter, for which there is little, if any, modern authority. If it still exists, it is probably limited to the effect which has already been suggested, viz., that in a doubtful case a jury might properly view with less than the ordinary amount of indulgence the intentionality evinced by a man in the doing of a fatal act, if the act in question were a crime in itself, or formed part of a crime or criminal attempt, other than that of homicide.

The conclusion arrived at is, then, that under the criminal law now in force there is no homicide without some form or degree of homicidal intentionality; although, by virtue of the doctrine of constructive manslaughter (or what remains of it), a somewhat slighter degree of recklessness to human life may possibly suffice to constitute *mens rea* in the case of an act *per se* criminal than would suffice in the case of innocent conduct.

It is, however, important to observe, in conclusion, that the importance and scope of the doctrine of constructive homicide have been greatly exaggerated in the past; and that in the majority of cases where it has been supposed to have been upheld and applied, the actual ground upon which the prisoner was, or might properly have been, convicted of murder or manslaughter was his having been in fact guilty of such conduct as would constitute that crime, apart altogether from the artificial doctrine in question, and strictly according to the ordinary principles of intentionality.

There are, in the first place, cases where the prisoner fully intended to commit murder, although not in the exact manner or with the identical result which actually ensued.

An example is the case, suggested by Lord Hale, of a man striking at

one person, missing him, and killing another, "whom he did not intend" (i). There is here wilful murder of the simplest and plainest description; because the *mens rea* in murder consists of a guilty intent to destroy *any* human life, and need not consist of an intention to destroy the life of the person actually killed. In the case of homicide, as in any other offence, the requirement of *mens rea* is satisfied if a person intend to commit the crime charged; it does not depend upon a fulfilment in every detail of his expectations as to the object upon whom, or manner in which, the mischief should fall. In such a case as that supposed, "*malitia egreditur personam*" (k); and the crime is characterised by culpable intentionality (l) as truly as in the case of "general malice," where the homicidal intention is indeterminate as regards its particular object.

That criminal liability in such cases has nothing whatever to do with constructive crime, but rests upon the main principle of culpable intentionality (m), was expressly pointed out in *R. v. Latimer* (n), where it was held, upon a case reserved, that a man who aimed a blow at one person and struck another, inflicting serious injury, was rightly convicted (o) of unlawfully and maliciously wounding the latter person. Lord Coleridge, C.J., said:—

"It is common knowledge that if a person has a malicious intent towards one person, and in carrying into effect that malicious intent he injures another man, he is guilty of what the law considers malice against the person so injured; because he is guilty of general malice, and is guilty if the result of his unlawful act be to injure a particular person. That would be the law, if the case were *res integra*; but it is not *res integra*, because in *R. v. Hunt* (p), a man, in attempting to injure A., stabbed the wrong man. There, in point of fact, he had no more intention of injuring B. than a man has an intent to injure a particular person who fires down a street where a number of persons are collected, and injures a person he never heard of before. But he had an intent to do an unlawful act; and in carrying out that intent he did injure a

(i) Vide *R. v. Salisbury*, Plowd. 100 (1553); Ken. S. C. 102; cf. *R. v. Saunders and Archer*, Fost. 371; Ken. S. C. 51.

(k) Fost. 261-2.

(l) Vide *R. v. Gross*, post, Chap. XII.

(m) Cf. Y. B. 14 Hen. 7, f. 14, Hil. 5 (1498), Ken. S. C. 20.

(n) 55 L. J. M. C. 135 (1886).

(o) 24 & 25 Vict. c. 100, s. 24.

(p) 1 Moo. 93 (1825).

person; and the law says that, under such circumstances, a man is guilty of maliciously wounding the person actually wounded.

"I cannot see that there can be any question, but for the case of *R. v. Pembliton* (q). Now, I think that case was properly decided; but upon a ground which renders it clearly distinguishable from the present case. That is to say, the statute which was under discussion in *R. v. Pembliton* makes an unlawful injury to property punishable in a certain way. In that case the jury and the facts expressly negatived that there was any intent to injure any property at all; and the Court held that, in a statute which created it an offence to injure property, there must be an intention to injure property, in order to support an indictment under that statute."

The *ratio decidendi* clearly was, that the prisoner's intention covered the act done. In point of detail, it differed from the event as to the precise manner in which the crime should be committed; but that difference did not affect *mens rea*, which consisted of an intent to commit the very crime charged in the indictment, and no other crime.

Felo de se is the same crime as wilful murder of another, and if a person, in firing a pistol with intent to commit suicide, accidentally kills another person, he is a murderer (r).

There have been numerous cases, ostensibly dealt with under the doctrine of constructive crime, where the prisoner, although not *fully* intending a fatal result of his conduct, acted recklessly, and the "unlawful act" relied upon, as involving constructive manslaughter, was in reality unlawful merely by reason of its actual recklessness, or else by virtue of the presumption that a man intends the natural consequences of his acts.

Thus, it has been thought (s) that an instance of constructive homicide is afforded by an act of manslaughter in engaging in, or attending at, unlawful sports or pastimes, such as prize-fighting (t), or any boxing match, where the doing of serious injury may be involved (u); and in *R. v. Fenton* (x) where the prisoner had wantonly thrown large stones

(q) *Supra*.

(r) *R. v. Hopwood*, 8 Cr. A. R. 143 (1913).

(s) *Fost.* 260; 1 East, P. C. 268; *Russ.* 785.

(t) *R. v. Young and Others*, 10 Cox, 371 (1866); *R. v. Orton and Others*, 14 Cox, 226 (1878).

(u) *Ward's Case*, 1 East, P. C. 270 (1789).

(x) 1 Lew. 179 (1830).

down a coal-pit, breaking the scaffolding, and indirectly causing the death of a man, Tindal, C.J., said :—

“ If death ensues as the consequence of a wrongful act, an act which the party who commits it can neither justify nor excuse, it is not accidental death, but manslaughter. . . . The act was one of mere wantonness and sport, but still, the act was wrongful ; it was a trespass ” (y).

These are obviously unnecessary applications of the supposed doctrine of constructive crime to cases where the ordinary doctrine of responsibility for the consequences of reckless conduct affords ample ground for the decisions.

Under the broad principle of intentionality also fall cases of homicide by an act done with full intent to inflict grievous bodily harm, but without any desire to kill.

If a man in striking another intends to inflict grievous bodily harm upon him, the distinction between that intent and an intent to kill is so slight and unimportant that the law will refuse to recognise it. In other words, there is a conclusive presumption of law, that a man fully intending to wound or maim another, and acting upon that intent in such a manner as to cause death, thereby evinces full homicidal intention, and is guilty of wilful murder. This conclusive presumption is a perfectly reasonable one ; because there is, in fact, necessarily a full intent to kill, in the sense that death is extremely likely to ensue, in one way or another, from any serious wound or bodily injury inflicted by violence. Why invoke the artificial doctrine of constructive crime in such a case ? It is superfluous, and tends only to confuse the issue.

The same reasoning might be applied, though with less force, to those cases referred to by Stephen, J., (z), as acts known to be dangerous to life, and likely in themselves to cause death, done for the purpose of committing a felony.

Not only are the crimes of arson and rape objectionable in themselves, on account of those consequences which inevitably attend their commission, but they must always involve more or less danger to human life. It is, therefore, not necessary, in order to justify the attaching of the guilt of wilful murder to any homicide arising out of such offences, to invoke the artificial doctrine of constructive murder, at any rate as a separate

(y) *Sed vide R. v. Franklin, supra.*

(z) *In R. v. Serné and Goldfinch, supra.*

principle of criminal liability. At the most, the supposed doctrine of constructive homicide in such cases amounts to no more than a *presumptio juris et de jure*, based upon a reasonable application of the ordinary principle of intentionality.

Lastly, it has been asserted by one writer that "if a man forcibly resists an officer making an arrest, and kills him, knowing him to be an officer, it may be murder, although no act is done which, but for his official function, would be criminal at all (a); and by another, that, "if A., a thief, pursued by B., a policeman who wishes to arrest A., trips up B., who is accidentally killed, A. commits murder" (b).

If these statements were correct, they would indeed afford an extreme instance of constructive murder; but there is no sufficient foundation for any such theory. The authority cited is Hale, who certainly lays down, without any *express* distinction as to the mode of death, that "where a minister of justice, as a bailiff, constable or watchman, etc., is killed in the execution of his office: in such case, it is murder" (c); and "if a constable or tithing man or watchman be in execution of his office, and be killed, it is murder" (d). But the context shows, beyond any reasonable doubt, that these passages were intended to be read merely in the sense of excluding the normal excuse of provocation.

If, indeed, Lord Hale left any doubt on the point, it seems to have been dispelled by Foster, who pronounced the killing of an officer of justice to be "murder of malice prepense, *as being an outrage wilfully committed* in defiance of the justice of the kingdom; the strongest indication possible of the *malitia*, the malignity of heart which I have already stated and explained" (e).

There is one particular class of cases which would at first sight appear to involve constructive crime—viz., where several persons act together in pursuance of a common intent, and in view of such joint action the law imputes to each and all of them the guilt of any act or acts done by one or more of them, in furtherance of such common intent (f).

(a) Holmes, 57.

(b) St. Dig., art. 244, illustration 11.

(c) Hale, I., 456.

(d) *Ib.* 460.

(e) *Fost.* 308; cf. *Kenny, Outl.*, 138-9.

(f) *Fost.* 351-4; *Sissinghurst House Case*, Hale, I., 462 (1672); *Macklin's Case*,

But here again there is no more than a superficial analogy ; for—

(1) The doctrine of constructive crime is, as we have seen, confined to homicides ; whereas the doctrine of common intent applies to all joint offences.

(2) The governing consideration in constructive crime is the unlawfulness of the occasion ; whereas the doctrine of common intent is rigidly confined within the limits of the common purpose (*g*). Thus, if several were to intend and agree together to frighten a constable, and one were to shoot him through the head, such an act would affect the individual only by whom it was done (*h*). So, in a recent case where one of two poachers shot at a gamekeeper with intent to murder him, and the jury found both of them guilty of that offence, by virtue of a joint purpose to resist the gamekeepers with violence : although upon appeal the Court found that there was sufficient evidence to support that verdict, it was expressly laid down that in such cases the joint purpose of “resistance at all costs, even to the extent of murder,” must be gathered from the actions and gestures of the prisoners, and cannot be inferred merely from the unlawfulness of the enterprise in which the prisoners were engaged (*i*).

(3) The doctrine of common intent is merely an application (*k*) to a particular class of cases of normal doctrines as to principals and accessories ; whereas the doctrine of constructive crime, if it were now recognised as a distinct principle of criminal liability, would be a corollary upon the main principle of intentionality, and would form an exception to the ordinary rules regulating imputability in respect of crimes dependent upon particular consequences.

2 Lew. 225 (1838), etc. ; cf. *R. v. Salmon*, 6 Q. B. D. 79 (1880), *ante*, Chap. VII. ; et vide *R. v. Joachim*, 7 Cr. A. R. 222 (1912).

(*g*) *Plummer's Case*, Kel. 155 (1701) ; *R. v. Hodgson and Others*, 1 Leach, 6 (1730) ; *Duffey's Case*, 1 Lew. 194, per Park, J. (1830).

(*h*) Per Alderson, B., in *Macklin's Case*, *ub. sup.*

(*i*) *R. v. Pridmore*, 29 T. L. R. 330 (1913), per Phillimore, J.

(*k*) *R. v. Price*, 8 Cox, 96 (1858) ; *R. v. Caton*, 12 Cox, 624 (1874) ; *R. v. Rubens*, 2 Cr. A. R. 183 (1909) ; *R. v. Connor*, 8 Cr. A. R. 152 (1913).

CHAPTER X.

COMPULSION.

THE second principle of imputability is that an act or omission cannot be a crime if it be purely involuntary, *i.e.*, if the doing or not doing of the act in question in no degree depended upon the wish or desire of the party charged with doing or omitting it.

The various cases falling within, or appearing to fall within, this important principle may best be classified as cases of *compulsion*, which may be defined as existing wherever an act or omission charged, or complained of, does not depend in any (even the slightest) degree upon the wish or desire of the defendant, or person whose conduct is in question.

Many cases, which might at first sight be thought to fall under this principle, are better considered as cases of excuse by reason of *ignorantia facti*, and as governed by the principle of intentionality; the species of excuse now to be considered being properly confined to cases where there is on the defendant's part no kind of prohibited conduct to which intentionality could apply.

In cases brought within the excuse of compulsion: "inasmuch as the party is mentally passive, it cannot be said, with perfect propriety, that he acts" (a).

"The *primâ facie* agent is not really the agent at all, but the instrument, or means" (b).

Both principles, that of intentionality and that of compulsion, are included in the single proposition that the sanction of the criminal law attaches only to culpable conduct. If there be no intentionality, there can be (under the first principle) no culpability; if there be no voluntary conduct, there can be (under the second principle) nothing to which *mens rea*, in the sense of culpable intentionality, can attach.

(a) Aust. 1060, n.

b) Clark, Anal., 33.

A man's objective conduct, or rather his outward movements, or state of passivity, may fail to be voluntary, or to constitute part of his subjective or true conduct, either as being compelled by natural forces or circumstances, apart from duress or human constraint, or as being directly and inevitably forced upon him by the act of another person.

I. NATURAL COMPULSION.

The various excuses which have been urged as pleas, or may be suggested as possible grounds of defence, against conviction of crimes alleged to have been committed under compulsion by natural causes or the force of circumstances, ought always to be tested by the application of that fundamental principle under which, if entitled to validity, they must necessarily be justified—viz., the principle of absence of volition.

In other words, they should be admitted or rejected according as the alleged compulsion or *force majeure* is or is not satisfactorily proved to have been such as to deprive the party altogether of any desire or choice between guilt and innocence of the crime charged.

(1) *Casus.*

The most common form of compulsion by natural causes is accident, or pure chance; where a man is a passive or innocent instrument of physical forces beyond his control.

Here, the principle of compulsion approximates closely to that of intentionality as affected by ignorance of fact.

The difference may be illustrated by a hypothetical case given in the old books:—

“A. whips an horse on which B. is riding, whereupon the horse springs out and runs over a child, and kills it: this is manslaughter in A., but misadventure in B.” (*c*).

The reason of its being only manslaughter in A. is that he does not know the child to be there: he acts voluntarily, in the sense of doing a reckless thing which he is not compelled to do; but, he acts in partial ignorance, and without full intention. His case falls under the principle of intentionality, not under that of compulsion.

(c) 1 East, P. C. 255; cf. 1 Hawk. c. 29, s. 3, and Hale, I., 476.

But as to B., the whole matter is a pure accident, and in fact he may not have performed any material act whatever. He simply sits on his horse, which swerves aside, and the question whether he be ignorant or cognizant of the presence of the child can in no degree affect his irresponsibility for an accident which is in nowise attributable to his conduct. His case is governed by the principle of compulsion, rather than by that of intentionality.

If a man's body be innocent of the act charged against him, the law does not concern itself with his state of mind; and the mere arrival through his instrumentality of what may seem to be the mischief of a crime, but is really nothing but *damnum fatale*, does not lay him open to punishment, or require his justification by proof that his state of mind was innocent.

The excuse of compulsion by accident is less frequently of importance than the doctrine of *ignorantia facti*; because the principle of compulsion generally is more obvious and simple in its application than the principle of intentionality.

Even the most zealous prosecutor would hardly indict a man in respect of such objective conduct as appeared to be purely involuntary. If any dispute arises in our Courts upon the excuse of accident, it usually turns on some doubt arising upon the evidence in the particular case, and not on a question of legal principle.

(2) *Impossibility.*

A somewhat similar form of compulsion by force of circumstances, apart from immediate human agency or duress, is the rare case of a man being placed by operation of the law in such a situation that he cannot possibly obey or comply with it. In such a case, the law in question, as applied to the particular individual, is not a true law or command, and the act charged is no true crime; because there can be no law, or breach of a law, where there is no possibility of performance (*d*).

A predicament of this kind, resembling that arising out of a so-called law *ex post facto*, was considered and adjudicated upon, as a ground of immunity, in an action against the commander of a man-of-war, for seizure of a fishing vessel in pursuance of the Pacific Islanders

(*d*) *R. v. Dunnnett*, 1 C. & K. 425 (1844).

Protection Act, 1872 (e). The vessel had on board certain natives of the South Sea Islands, who were being conveyed home, after a fishing expedition in which they had been employed as labourers. By the Act in question, which had been passed after the commencement of the voyage, such a vessel must have a licence, and a vessel carrying native labourers without such a licence was made liable to seizure. In the Court of Appeal it was held that the plaintiff had no claim for damages, but the Court (f) pronounced the opinion that he had not been guilty of any infringement of the statute, because, in commencing the voyage, with the natives on board, he had acted within the law, the statute in question being then not yet in force :—

“ It may, however, be suggested that the carrying, though not unlawful in its commencement, became so when the Act came into operation, notwithstanding the ignorance of the master that any such Act was in force, and though it was then out of his power to obtain a license. But before a continuous act or proceeding, not originally unlawful, can be treated as unlawful by reason of the passing of an Act of Parliament by which it is in terms made so, a reasonable time must be allowed for its discontinuance ; and though ignorance of the law may of itself be no excuse for the master of a vessel who may act in contravention of it (g), such ignorance may nevertheless be taken into account when it becomes necessary to consider the circumstances under which the act or proceeding alleged to be unlawful was continued, and when and how it was discontinued, and with a view to determine whether a reasonable time had elapsed without its being discontinued. . . . Had he put the natives on shore at the island nearest to him at the time when he first heard of the Kidnapping Act, he would not only have broken his contract with them, but would have been guilty of an act of cruelty in all probability as great as any which it was the avowed object of the Act to prevent ” (h).

With the exception of penal laws passed *ex post facto*, which have no place in civilised legislation, this is probably an unique instance of a man being placed, by the direct operation of a statute, in a situation where he is forced to contravene it, in an objective sense, such contravention being excusable solely on the ground that it in no degree depends on the wishes of the party.

(e) 35 & 36 Vict. c. 19, s. 16.

(f) Per Baggallay, L.J.

(g) Vide Chap. III., *ante*.

(h) *Burns v. Nowell*, 5 Q. B. D. 444 (1880).

Upon very much the same footing stand such cases as were suggested by the late Sir J. F. Stephen under the name of a "choice of evils" :—

"Suppose a ship so situated that the only possible way of avoiding a collision with another ship, which must probably sink one or both of them, is by running down a small boat. Or suppose that in delivering a woman it is necessary to sacrifice the child's life to save the mother. I apprehend that in neither of these cases would an offence be committed. It would, however, be necessary to show that the discretion used was used fairly. I should think, for instance, that if, in order to procure an heir, the mother's life was sacrificed to the unborn child's, the parties concerned might be guilty of murder" (i).

Stephen apparently assumes that the commander, or person controlling the ship, and placed in the dilemma described, arrives at it by no fault of his own, and that whatever course he pursues, the lives of others will inevitably, or without any appreciable difference of probability in either case, be sacrificed. It surely follows that neither course will involve him in criminal liability. Probably he will exercise his discretion or that mysterious faculty which Nature bestows on a man when there is no time for discretion, toward the sacrificing of as few lives as possible. But whatever he does, he can plead not guilty of any culpable homicide ; because the destruction of human life did not depend on his wishes, but was forced upon him by circumstances beyond his control.

With regard to the supposed case of the mother and child, Stephen can hardly have intended to disregard the fact that it is not, according to the law of England, homicide to kill a child before or during the act of birth (k). He perhaps meant to refer to the possibility of something being done to save the mother's life with the result that the infant, though born alive, expires shortly after birth. In such a case the act, if intentionally done without the excuse suggested, would be murder (l). The solution here seems to be precisely similar to that of the other problem. According to the law of England (and apart altogether from any question of conscience) the surgeon would be at liberty to take his own choice between the mother and the child, and would be immune from punishment in either case. There appears to be no authority

(i) St. Hist., II., 110.

(k) Hale, I., 433 ; *R. v. Poulton*, 5 C. & P. 329 (1832) ; *R. v. Pulley*, ib. 539 (1833) ; *R. v. Sellis*, 7 id. 850 (1837).

(l) 3 Inst. 50 ; 1 Hawk. c. 31, s. 16 ; Bl. Comm., IV., 198 ; *R. v. Senior*, 1 Moo. 346 (1832) ; *R. v. West*, 2 Cox, 237 (1848).

whatever for Stephen's suggestion that guilt or innocence would depend upon the motive present to his mind. As has been shown (*m*), motive is not normally a determining factor in criminal liability, unless made so by express statutory provision. The defence of a surgeon in the case suggested would be, not purity of motive, but that the law sets no higher value upon one existing human life (except that of the King, Queen, or Prince of Wales) than upon another; and that he did not in fact commit homicide, because the taking of the one human life or the other was forced upon him by natural causes.

(3) *Automatism.*

The excuse of compulsion attaches to the objective conduct of a somnambulist, or a person in a state of partial unconsciousness. Where wakefulness ends and sleep begins is a question which none of us can answer in our own case, but as to which the testimony of eye-witnesses, coupled perhaps with medical evidence, would usually lead to a more or less satisfactory conclusion in any case coming before the Courts. The decision in any such case would turn upon the demeanour and antecedents of the person whose conduct was in question, and the circumstances surrounding such conduct (*n*).

It would lie upon the party pleading absence of volition from such a cause to establish the excuse by clear evidence. Once established beyond all reasonable doubt, it is obviously as good an excuse for an alleged crime as any that could be thought of (*o*). A man cannot well be blamed for dreaming, or for the consequences of his dream (*p*). The same remark applies to the acute delirium of "patients suffering from febrile ailments" (*q*).

Under the same rule also come all involuntary movements of the body impelled by natural causes independently of wish or desire, *e.g.*, such as arise from convulsions or a spasm.

So also—

"In chorea and in tabes, movements initiated by voluntary effort may

(*m*) *Ante*, Chaps. I. and VII.

(*n*) *Sed cf.* Maudsley, 249—253. ✓

(*o*) *Vide R. v. Milligan*, Tayl., Princ., 892 (1836); *R. v. Byron*, *ib.* (1863).

(*p*) *Cf.* St. Gen. V., 79; Clark, *Anal.*, 27-8.

(*q*) *Vide Poore*, 413.

be so modified and interfered with during the passage of the efferent current from the brain to the muscles, as to produce acts that are unwilling. A choreic person may scald another by upsetting boiling water over him, or a tabetic may stamp violently upon another person's foot; but since in neither case was the harmful action willed, no responsibility for it will attach to the actor. The choreic person willed to move the saucepan, but not to upset it; and the tabetic willed to put his foot down, but not on the other person's foot, nor to stamp violently" (r).

In all such cases, if and when falling to be adjudicated upon, the decision would depend mainly upon the medical evidence.

In our country, however, the integrity of judges may be relied upon to protect juries from a too ready acceptance of the fanciful theories now in vogue as to compulsion by the severance of dual personality and the like, whatever plausible arguments may be urged in support thereof.

In a recent case at the Derby assizes, a prisoner charged with stealing a friend's motor car was proved to have broken into the garage where it was kept, to have removed the car and altered the number on it, and, having obtained petrol on credit by false pretences, to have taken the car some distance into the country. Upon being locked up for his misdeeds, the prisoner was found lying on the floor of his cell, and, being lifted up he passed his hand over his face, and said, "Where am I?" Upon being told, he said, "Good God, what am I doing here?" Automatism was set up as a defence, and the prisoner alleged that he remembered nothing that had taken place between an occasion some weeks before the commission of the offence and the finding himself in the police cell. The defence was supported by medical opinions, and Dr. Hyslop, formerly lecturer on mental diseases and demonstrator of psychology in London hospitals, is reported to have described the accused's condition at the time of the offence as one of mental automatism, "which was midway between somnambulism and a minor form of epilepsy. In that state the person affected could perform complicated mental and physical actions, of which he would have no recollection on recovering. He did not suggest that the accused was insane." In cross-examination, the witness is stated to have admitted that there were cases of mental automatism in which "the abnormal irresponsible self did know at the time what it was doing, but that the normal self would have no recollection of it. It was as though there were two distinct personalities in the one body."

In the course of the evidence, some pointed remarks were made by Scrutton, J., on the defence set up :—

“ He had heard of a case in America where a girl changed every two or three years. Sometimes she was a good girl, and sometimes she was a bad girl, and the good girl never had any recollection of what the bad girl had done. The question was, whether the accused knew at the time he took the car that he was doing wrong, not whether he remembered it now. In his opinion, Dr. Jekyll would have been hanged for the murder that Mr. Hyde committed, if it were proved that Mr. Hyde knew what he was doing.”

The prisoner was very properly convicted, upon the following direction to the jury :—

“ In that dock was a body, and in that body was a brain, which, in some mysterious way, controlled the actions of the body, and which possessed the power, by some means still undiscovered by science, of determining right from wrong. They had been told that upon June 2nd the controlling power of that body's brain went to sleep, and that it woke up again in July, and that in the meantime the body was not responsible for what it did . . . So far as he knew, that was the first occasion in England when the question of a double consciousness had been raised in the Courts. They were dangerous things, these double personalities ; people going about in this manner, taking motor cars, altering name plates, incurring expenses, and telling lies in that way ” (s).

(4) *Lack of Self-Control.*

It would be under the heading of natural compulsion that would fall (t), if ever admitted by the law of England, the excuses of irresistible impulse, obsession, affective or moral insanity, *et hoc genus omne* : which have by various writers been alleged to destroy or impair a man's self-control to such a degree that the law ought to suspend or mitigate its sanction, or attempted power over his conduct ; although he may be capable of understanding the law, and of fully appreciating, in an intellectual sense, its injunctions and prohibitions.

Since the formal definition of legal insanity by the Answers in *McNaghten's Case* (u), a great controversy has been raised by the medical

(s) *R. v. Chetwynd*, Times N., November 4, 1912, 76 J. P. N., 544.

(t) Cf. Clark, Anal., 34, contra.

(u) *Ante*, Chap. V.

profession upon the supposed expediency of altering the law in such a way as to relieve from punishment all persons afflicted by a form of aberration or disposition which may perhaps be fairly described as *morbid criminality*.

At the time the answers were given, medical men were already urging the recognition of *manie sans délire*, or "a disordered condition of the moral affections and propensities, unaccompanied by any delusion of the intellectual powers," as a ground of exemption from punishment.

"Many medical writers consider this affection under the name of moral insanity. Dr. Mayo, who objects to this appellation, has termed it *brutality*. In these cases, the person manifests no mental delusion; is not monomaniacal; has no hallucination; does not confound fancies with realities; but simply labours under a morbid state of the feelings and affections, or in other words, a diseased volition. The intellectual faculties are apparently sound; the person often exhibits superior mental capacity, reasons ably, is conscious of his moral relations, performs all the duties of life with praiseworthy and scrupulous exactness, and yet may be morally insane" (x).

Sir J. F. Stephen, in writing upon the subject of the criminal responsibility of the insane, repeatedly adverted to this question, and supported the view that the law does not make due allowance for cases where a person, though suffering no disorder of his intellectual faculties, is alleged to be incapable of controlling his conduct by giving a due resistance to criminal impulses or inclinations (y).

Lord Cockburn, C.J., also concurred in the demand for a "reform"; but gave no measure of support to a theory (unfortunately propounded by Stephen) to the effect that the existing law could be stretched in the desired direction without special legislation on the point. In giving evidence before a Committee of the House of Commons, upon a Bill introduced by Mr. Russell Gurney in 1874 for the definition of the law of homicide, he said:—

"As the law, as expounded by the judges in the House of Lords, now stands, it is only when mental disease produces incapacity to distinguish between right and wrong that immunity from the penal consequences of crime is admitted.

"The present Bill introduces a new element, the absence of the power

(x) Winslow (1843), p. 26; cf. Renton, pp. 909-10.

(y) St. Hist., Chap. 19; St. Gen. V., Chap. 6; St. Dig. (1st ed.), art. 27, and Appendix, Note 1.

of self-control. I concur most cordially in the proposed alteration of the law, having been always strongly of opinion that, as the pathology of insanity abundantly establishes, there are forms of mental disease in which, though the patient is quite aware he is about to do wrong, the will becomes overpowered by the force of irresistible impulse; the power of self-control, when destroyed or suspended by mental disease, becomes, I think, an essential element of responsibility."

A more conservative view was expressed by the Royal Commission responsible for the Draft Criminal Code of 1878, whereof Stephen himself was a member, and for the preparation of whose Report he was probably mainly responsible. In defining the excuse of insanity (z) they adhered closely to the doctrines formulated by the judges in 1843, and at some length expressed the opinion that the rule of law theretofore observed should be maintained, and that the doctrine of irresistible impulse proposed by the Bill already referred to should be rejected as dangerous and unnecessary :—

"The principal substantial difference between section 22 of the Draft Code and the corresponding section of the Bill is, that the latter recognises as an excuse the existence of an impulse to commit a crime so violent that the offender would not be prevented from doing the act by knowing that the greatest punishment permitted by law for the offence would be instantly inflicted, the theory being that it is useless to threaten a person over whom, by the supposition, threats can exercise no influence. This provision of the Bill assumes that the accused would not be protected by the preceding part of the section, and therefore that he was, at the time he did the act, capable of appreciating its nature and quality, and knew that what he was doing was wrong. The test proposed for distinguishing between such a state of mind and a criminal motive, the offspring of revenge, hatred, or ungoverned passion, appears to us on the whole not to be practicable or safe, and we are unable to suggest one which would satisfy these requisites and obviate the risk of a jury being misled by considerations of so metaphysical a character. It must be borne in mind, that, although insanity is a defence which is applicable to any criminal charge, it is most frequently put forward in trials for murder, and for this offence the law—and we think wisely—awards upon conviction a fixed punishment which the judge has no power to mitigate. In the case of any other offence, if it should appear that the offender was afflicted with some unsoundness of mind, but not to such a degree as to render him irresponsible—in other words, where the criminal element predominates, though mixed in a greater or less degree with the insane element—the judge can apportion the punishment to

(z) Cr. Code, s. 22.

the degree of criminality, making allowance for the weakened or disordered intellect. But in a case of murder this can only be done by an appeal to the executive ; and we are of opinion that this difficulty cannot be successfully avoided by any definition of insanity which would be both safe and practicable, and that many cases must occur which cannot be satisfactorily dealt with otherwise than by such an appeal " (a).

The same conclusion seems to have been arrived at by official medical opinion in this country, as embodied in the Report of the Criminal Responsibility Committee of the Medico-Psychological Association, 1894—6, to the effect that, in the course of their inquiries, they had felt the ground for an alteration in the law was dissolving beneath their feet ; that there was no such amount or degree of injustice to insane offenders as would warrant an application for an alteration in the law ; and that there was no foundation for the suggestion that the law bears hardly upon insane offenders ; and that under the circumstances disclosed by their investigations they were unable to make any recommendations for the amendment of the law (b).

The most recent and authoritative descriptions of the disease or temperament of moral or effective insanity bring into prominence the fact that little, if any, difference can be marked between that affliction and a criminal disposition, or a state of chronic moral wickedness.

"L'état mental pathologique qu'on appelle moral insanity est si rapproché de celui du criminel-né qu'il est difficile de les distinguer, car si ces deux états diffèrent l'un de l'autre, c'est plutôt par la quantité que par la qualité. Il est même probable que dans l'avenir ils seront fusionnés en un seul phénomène, lorsque les données scientifiques seront plus abondantes et mieux élaborées. . . . L'anomalie mentionnée consiste en une déviation pathologique des sentiments, des inclinations et des forces actives, coexistant avec des facultés intellectuelles intactes, inaltérées. . . . De pareils êtres ne sont pas même en état d'être criminels, vu qu'ils sont incapables de poursuivre un but, d'observer certaines règles, certain système ou les intérêts communs. Esclaves obéissants de leurs fantaisies d'un moment, ils commencent tout, mais n'achèvent rien " (c).

An eminent English authority, while urging what he regards as the necessity for some alteration of the law concerning this matter, clearly

(a) Cr. Code Rep., pp. 17-18.

(b) Vide Merc., Cr. Resp., pp. 215-223.

(c) Kov., 246-7.

expresses the fact that both sane and insane conditions are included within the scope of moral disorder of mind :—

“ There is also moral disorder, which is disorder of mind, and may amount to actual insanity, but is unaccompanied by any delusion or by any discoverable disorder of intellect. In such cases, the intellect may be acute, and the reasoning powers equal to, or above, the average, but the person affected has an incurable kink in his mind, which renders him insensible to the obligations of morality ” (*d*).

The same writer, in distinguishing between moral insanity and moral imbecility, gives as lucid a description of both states of mind as can anywhere be found :—

“ The test of ignorance will not suffice in cases of moral insanity and moral imbecility. It can scarcely be contended that morally insane persons should be completely exonerated from punishment for offences done to satisfy morbid desire. It does not, however, appear just to punish them with full severity. Although they are not exonerable under the test of insanity at present in force, yet, when the facts are brought before the judge, the punishment is usually in practice mitigated. It seems desirable that the state of moral insanity should be recognised as a morbid state, and the practice made universal in such cases.

“ The test of ignorance will not suffice to exonerate moral imbeciles from the penal consequences of their offences. Yet it is repugnant to the sense of justice to punish persons who, it is clear, are morbidly constituted, and on whom punishment has no deterrent effect. It seems desirable that the state of moral imbecility should be recognised as a morbid state ; and that, when it is proved to exist, the subject of it should not be convicted as an ordinary criminal, but should be relegated to special treatment, directed to the removal of his disability.

“ The moral insanity and moral imbecility here spoken of are peculiar mental affections, whose existence is proved beyond doubt. Moral imbecility is a congenital inability to distinguish between right and wrong and to be influenced by punishment. It does not often endure to adult life, but is frequent in children. Such children steal and lie, are in some cases cruel, and even murderous ; in others precociously lustful ; and in all, are undeterred from their evil practices by the fear of punishment, even when it has been, in the past, prompt and severe, and when the future prospect of it is that it will be severe, prompt, and certain. The morally insane are those who, after a life of uprightness and rectitude, become, in middle age or later, perverted in conduct,

(*d*) Merc., Cr. and Ins., 35.

and take to criminal and immoral practices, which, as in moral imbecility, punishment and exposure are ineffectual to arrest " (e).

Obsession, or *idée fixe* (f), is another form of abnormality which has been urged as properly exempting the sufferer from punishment, but not coming within the legal definition of insanity incapacitating from the commission of crime.

A curious argument has been urged to support this particular claim :—

" In any case in which the perpetrator of a crime—for instance a murder by poisoning—is unknown, proof of motive is a very important part of the case for the prosecution ; and if it is proper in any case to show that the prisoner had a motive, it is surely proper to show that he had not. In cases of obsession the absence of motive for the crime, and the presence of a motive against it, are surely important factors in the determination of the degree of responsibility that is to attach to the crime " (g).

This argument so obviously confounds the question of admitting evidence of motive or its absence to prove matters of fact, with the question of its admission to exempt a criminal from conviction or punishment, that it need hardly be taken seriously.

" I know of no case in this country in which any person has ever been tried for a crime which appeared to have been committed under the influence of obsession ; and in the many cases that I have seen in which the obsession was towards violence, I have never known one in which the intention was carried out into action. Obsession to the utterance of objectionable words appears, however, to be much less under control, and does often issue in action. Whilst, therefore, there is no case on record in this country in which obsession has been pleaded, it seems likely that sooner or later a crime will be committed by an obsessed person, and if the existence of obsession is proved it seems right and just that it should go far to remove the responsibility of the obsessed person " (h).

These passages seem to suggest a fallacy underlying most of the arguments commonly urged in connection with the more plausible claim of moral insanity, viz., that a given class of persons can be placed under a diminished or partial degree of responsibility for crime, short of full

(e) *Ib.*, 251-3.

(f) Ribot, Chap. 2.

(g) Mercier (Allbutt), 866.

(h) *Ib.*, 867.

responsibility. This is, of course, an impossibility under the existing system of criminal law and procedure :—

“ Criminal responsibility means liability to be convicted of or punished for crime, and such liability either exists or does not exist ; there is no *tertium quid*. Diminished, attenuated responsibility has, with some laxity of thought, been explained to mean liability to a less punishment ; it means nothing of the kind ; logically understood, it must be taken to express a less liability to punishment, a notion which is obviously nonsensical. For since the lightest punishment is still punishment, its infliction pre-supposes liability, *i.e.*, responsibility ; in other words, the question of responsibility must be answered in the affirmative before that of mitigation of punishment can arise at all ” (*i*).

Closely connected with obsession, but covering a wider field of supposed “ helplessness,” is the plight of persons acting under the spell of what is often referred to as an uncontrollable or overwhelming impulse to do a criminal act.

Urgent evil desires, or “ morbid and unnatural appetites ” (*k*), do not make a man helpless ; they only make him wicked ; and the law, as it now stands, refuses to recognise wickedness as a ground of immunity from punishment.

Every crime is committed under an impulse, and the criminal is punished for not resisting it (*l*).

“ It has not infrequently been pleaded in defence of a person charged with crime, that the crime was committed under the stress of an irresistible impulse. . . . Such a defence must be extremely difficult to establish. Even if it is proved that the act was impulsive, the fact that it was irresistible cannot be known except to the actor. All that witnesses can observe is that it was not in fact resisted. They can never know if all the reserves of the actor’s self-control were called up to resist it ” (*m*).

These observations apply with obvious force to the excuse of “ kleptomania ” (*n*) and nervous or mental aberration frequently set up, with more or less plausibility, in summary proceedings and trials at the sessions for larceny, and sometimes with a success reflecting more credit upon the prisoner’s counsel than upon the magistrate or jury (*o*).

(*i*) Oppenh., 226.

(*k*) Baron Bramwell, p. 898.

(*l*) Taylor, Princ., 880.

(*m*) Mercier (Allbutt), 859.

(*n*) *Ib.*, 873-4.

(*o*) *R. v. Collins*, Renton, 912 (1895).

The creation of the proposed excuse of absence of self-control would, if it were permitted to have any operation in practice, result in the most deplorable embarrassment of criminal trials. It would seem impossible, even by dint of interminable inquiries into the prisoner's ancestry, education, family history, general circumstances and antecedents, to procure such evidence of the existence of an uncontrollable or irresistible impulse as would establish beyond reasonable doubt the fact of his absolute helplessness under its influence.

Even under the present law, in all its supposed harshness, no case is known ever to have occurred in which a criminal impulse has been clearly proved to be irresistible, in the strict meaning of the word (*p*). If, however, it were generally known among persons of criminal disposition, that the sanction of the law might be waived in their favour, it would be (if possible) still more difficult than at present to show that an impulse alleged to have been irresistible was so in fact.

Let us suppose the law to be modified in the way suggested, and that it entitled every person afflicted by an irresistible impulse to give way to it, commit the crime under its influence, and go scot free. Let us suppose the crime to be murder, and that the prosecution have proved the case, the act having been committed without concealment, without such a motive as would prompt an ordinary person to crime, and in practical certainty that it would form the subject of a capital trial. The defence is that the prisoner, although fully aware of the law prohibiting wilful murder (and fully aware also of the vicious "amendment" of the law by which he has a chance of escaping punishment) and of the nature and quality of his act, was impelled to its commission, regardless of the probable consequences to himself. There might, conceivably, be little difficulty in proving those facts, but to what conclusion would they lead? Merely that the prisoner was rendered regardless of the consequences *likely* to ensue. But as his intellectual faculties are supposed to be unimpaired and normal, the prosecution would oppose the apparently unanswerable proposition that *if* the penalty of the law had been more certain in its incidence, *if* the prisoner had known that the ordinary law applied to his conduct, and had not been aware that his impulsive or morbid temperament rendered him a privileged person,

(*p*) Et vide St. Hist., II., 172.

the fear of judgment and execution *would*, or at any rate might, have deterred him from the crime.

In short, difficult as it now is (or is alleged to be) to gauge the character of such acts under the general law, the difficulty would be increased a thousand-fold by the introduction of a new exception, the effect of which would be to regulate liability, not by the prisoner's *actual* mental condition in relation to the law as applying to his act, but by the mental condition under which it *might* have been committed if the exception had not been created, and so had not entered into the prisoner's contemplation as a factor of the utmost importance in determining his behaviour.

As to the present condition of the law, there is abundant authority for the proposition that "irresistible impulse" and "moral insanity" are no excuses for crime, and can be of importance in a criminal Court only in so far as they may be symptomatic of "legal insanity," in the sense of mental disease causing inability to appreciate the true relation of law to conduct.

In *R. v. Stokes* (g) the prisoner committed an impulsive murder, in cold blood, with witnesses present, and without any assignable motive for the deed. In directing the jury Rolfe, B., said :—

"It is true that learned speculators, in their writings, have laid it down that men, with a consciousness that they were doing wrong, were irresistibly compelled to do some unlawful act. But who enabled them to dive into the human heart, and see the real motive that prompted the commission of such deeds ? . . . It is dangerous ground to take, to say that a man must be insane because men fail to discern the motive for his act. . . . It would be a most dangerous doctrine to lay down that, because a man commits a desperate offence, with the chance of instant death, and the certainty of future punishment before him, he was therefore insane : as if the perpetration of crimes was to be excused by their very atrocity."

This strong judgment was quoted with approval in *R. v. Barton* (r), another case where irresistible impulse was unsuccessfully alleged, to excuse the murder of the prisoner's wife. Parke, B., insisted upon

(g) 3 C. & K. 185 (1848).

(r) 3 Cox, 275 (1848) ; et vide *R. v. Cockroft*, Tayl., Man., 788 (1865), per Mellor, J. *R. v. Dove*, Renton, 900, per Bramwell, B. ; and *R. v. Duncan*, ib., 901, 908, per Lawrance, J. (1890).

the recognised knowledge test as necessary to show an excuse on the ground of insanity, and after summing up the facts, which proved the prisoner to have been in troubled circumstances and unsettled in his mind, said the only question was, whether he knew the nature and character of the deed he was committing, and if so whether he knew he was doing wrong in so acting :—

“ This mode of dealing with the defence of insanity had not, he was aware, the concurrence of medical men, but he must nevertheless express his decided concurrence with Rolfe, B.’s, views of such cases. . . . Reliance was placed on the desire to commit suicide, but that did not always evidence insanity. . . . The fact, however, must be taken into account, for it might have had a serious effect on the mind of the prisoner, as also the absence of any attempt to escape from justice, and the want of all sense of sorrow and regret immediately after the death of his wife. . . . These circumstances ought all to be taken into consideration, but it was difficult to see how they could establish the plea of insanity in a case where there was a total absence of all delusion.”

Upon this direction the prisoner was found guilty.

It is, of course, now recognised that there may well be insanity without specific delusions (*s*) ; but the *ratio decidendi* was the necessity of applying the test of legal insanity, and of disregarding the alleged impulse as a separate or independent ground of immunity.

To the same effect was the summing-up in *R. v. Burton* (*t*), where the excuse of irresistible impulse was again set up, and fortified by quotations from Dr. Winslow’s writings.

In *R. v. Layton* (*u*) Rolfe, B., directed a jury that they should take want of motive and inevitability of detection into consideration only in conjunction with “ evidence of insanity on any other particular point ” ; thereby implying that such circumstances are to be regarded at the most as points of evidence upon the existence of insanity in the accepted or “ legal ” sense.

In *R. v. Haynes* (*x*) the prisoner was convicted (but afterwards reprieved) as the murderer of a woman with whom he was on the most

(*s*) *Ante*, Chap. V.

(*t*) 3 F. & F. 772 (1863), *ante*, Chap. V.

(*u*) 4 Cox, 149 ; *ante*, Chap. V. (1849).

(*x*) 1 F. & F. 666 (1859) ; cf. *R. v. Roberts*, Tayl., Princ., 869, where the prisoner, though admittedly of unsound mind, was convicted of arson, and sentenced by Bramwell, B. (1860).

friendly terms. No motive could be suggested for the crime; and irresistible impulse, or an insane homicidal tendency, was set up by way of defence, as to which Bramwell, B., in his direction, said :—

“ The circumstance of an act being apparently motiveless is no ground from which you can safely infer the existence of such an influence. Motives exist, unknown and innumerable, which might prompt the act. A morbid and restless (but resistible) thirst for blood would itself be a motive urging to such a deed for its own relief. But if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence : the restraint of religion, the restraint of conscience, and the restraint of the law. But if the influence itself be held a legal excuse rendering the crime dispunishable, you at once withdraw a most powerful restraint—that forbidding and punishing its perpetration. We must return therefore to the simple question you have to determine : did the prisoner know the nature of the act he was doing, and did he know that he was doing what was wrong ? ”

So, also, it has been laid down that “ temporary insanity is not known to English law ” (y) ; and a judge is not bound even to put to a jury a defence resting upon an unsupported hypothesis of impulsive insanity (z).

Against the clear and reasoned judgments quoted above, are to be set only two or three more or less hasty pronouncements in which juries have been, in effect, directed to give the prisoner the benefit of a doubt appearing on the evidence as to his mental condition and responsibility under the law (a).

Exceptio probat regulam. For example, the judgment of Denman, C.J., in *R. v. Oxford* (b) has sometimes been cited as supporting the excuse of “ irresistible impulse ” (c) ; and one of the sentences in it does at first sight give that impression ; but if the whole judgment be read together,

(y) Per Darling, J., *R. v. Harding*, 1 Cr. A. R. 219 (1908).

(z) *R. v. Thomas*, 7 id. 36 (1911).

(a) Vide *R. v. Jordan*, Tayl., Princ., 881 (1872) ; *R. v. Gill* (1883) ; Oppenh., 27 ; and *R. v. Prince* (1898), Tayl., Princ., I., 881 ; *sed vide R. v. Humphreys* (1878), Tayl., Man., 780, *contra*.

(b) 9 C. & P. 525 ; *ante*, Chap. V.

(c) Pitt Lew. and Sm., 217 ; Kenny, Outl., 56.

it will be found clearly to apply the recognised test of knowledge as to the criminal character of the act.

Again, it has been suggested that *epilepsy* and *puerperal fever* are two cases where the excuse of irresistible impulse has been admitted by law (*d*). There is no authority whatever for the former assertion; and the only authority cited for the latter is a case where a poor woman, suffering under insane delusions caused by the effects of childbirth, killed her husband and child, and Erle, C.J., summed up in the following terms:—

“There was a morbid action of the brain; there was a state of disease resulting from childbirth; and other causes which might lead to insanity; and there were before the act in question delusions of the senses, which medical men consider, and might well consider, symptoms of insanity. She seems to have fancied she saw and heard devils, even when no one was in the house alive but herself. . . . It is for you to say whether upon such evidence you consider she was in such a state as to know the nature of her actions, and to be aware that she was committing a crime” (*e*).

Pyromania, nymphomania, satyriasis, homicidal mania, and mania of persecution appear to be, one and all, forms or “ramifications” of moral insanity (*f*). At any rate, one observation applies to the whole group of eccentricities; viz., that, however much a man’s motives may be affected by them, they are inadmissible as grounds of excuse under the law of England; and are immaterial to the issue of guilt or innocence, unless as symptoms of accompanying insanity affecting *mens rea* by depriving the patient of the power of discriminating between good and evil (*g*).

Two cases of merciful directions to juries are noted in a recent textbook as indicating a tendency to lapse from the rigid rule of law concerning the excuse of insanity (*h*). They effect no innovation, or fresh definition of the law, and can hardly reverse or modify the well-established rule on the subject which is now fortified by frequent recognition in the Court of Criminal Appeal (*i*).

(*d*) Pitt Lew. and Sm., 218.

(*e*) *R. v. Law*, 2 F. & F. 836 (1862).

(*f*) Renton, 910.

(*g*) As to “senile decay,” vide *R. v. Bond*, Tayl., Princ., 869 (1904).

(*h*) *R. v. Jackson*, 122 O. B. Sess. Prs. 1156 (1895^f); *R. v. Cox*, Times N., July 29, 1901; Kenny, Outl., 56.

(*i*) Vide cases cited in Chap. V., *ante*, and *infra*.

In a recent trial at the Old Bailey, upon an indictment for felonious shooting with intent to murder, the prisoner was proved to have fired several times with a revolver at a man whom he casually met on a country road. In explanation of his conduct he said "that he had experienced practically every sensation; that full knowledge came from experience; that he had never experienced the killing of a man; and that he had weighed the *pros* and *cons* of what he was going to do." The prison doctor pronounced him to be of unsound mind, suffering from impulsive homicidal mania, suicidal mania, and claustrophobia, and said that in his opinion the prisoner knew that he was firing a revolver, and that it was wrong to do so; but that owing to disease of the mind he was unable to control the homicidal impulse which dominated him. Under the direction of Darling, J., the jury returned the statutory verdict of "guilty but insane" (*k*). The official report of the case (*l*) states it to have been found that the prisoner "knew the nature of the act, but he did not know the quality of it" (*m*).

This case, although not modifying, or purporting to modify, the established doctrine, certainly illustrates a modern judicial tendency to treat the existence of extreme and clearly established impulsive insanity, when supplemented by absence of any settled motive for the act charged, as symptomatic of intellectual insanity, which in some degree must usually, if not invariably, accompany it. Where this practice is adopted, the prisoner may, by a merciful jury, be "given the benefit of the doubt," and presumptively credited with such unsoundness of mind as is incompatible with *mens rea*.

The rule of law could not be affected by the verdicts brought in by juries in such cases, even if they were more numerous than they are, and a remark made by a great jurist upon this subject in 1885 is as true now as when it was written:—

"The law is what I have mentioned, though very loosely administered . . . that all should be punished, who should be threatened with punishment; that all should be threatened, who understand the threat—all where there is *mens rea*" (*n*).

(*k*) *R. v. Hay*, 22 Cox, 268 (1911).

(*l*) 155 D. B. Sess. Pts. 337.

(*m*) Vide Ken., S. C., 53 (note).

(*n*) Baron Bramwell, Art., p. 899.

In *R. v. Victor Jones* (o) it was laid down that, where the defence of insanity has been rejected by the jury, the Court will not interfere with their verdict, except on conclusive proof of insanity according to the recognised legal test. The case of *R. v. Jefferson* (p) was cited on behalf of the appellant, and the views tentatively put forward by the late Sir J. F. Stephen were urged with some force and ability, but the Court, per Lord Alverstone, C.J., said :—

“There is no need here to enter upon a disquisition as to the terms in which the question ought to be left, when a person is prevented by defective mental power or mental disease from knowing the nature of his acts, or from controlling his conduct. . . . A grave responsibility will lie upon this Court, whenever it shall become necessary to decide those larger and important questions which have been raised in the argument of appellant's counsel.”

In *R. v. Abramovitch* (q), where the appellant was convicted of murdering a man and woman, to whom he had lost money in gambling, and whose watches, money, and clothes were found in his possession after the murder, it was endeavoured to make the plea of impulsive or emotional insanity more acceptable to the Court by describing it as “transitory mania”; but with no success; and the Court has refused to entertain the suggestion that words or other conduct may constitute provocation to a man “on the border-line of insanity” which would not afford a defence to “a perfectly sane person” (r).

Upon the whole subject of affective insanity, it seems impossible for any unprejudiced person, acquainted not merely with the general doctrines of the criminal law but also with the unalterable principles upon which they are based, to come to any other conclusion than that arrived at by Dr. H. Oppenheimer, after a careful study not only of English law, but of the legal systems of various foreign countries—viz., that no impulse ought to be admitted as an excuse for crime, unless proved to be “irresistible” in the extreme sense that nothing but mechanical restraint could have prevented the act. The learned writer, after propounding that doctrine, asks the pointed question, whether

(o) 4 Cr. A. R. 207.

(p) *Ante*, Chap. V.

(q) 7 Cr. A. R. 145 (1912).

(r) *R. v. Alexander* 109 L. T. 745 (1913).

such impulses ever occur in a state of consciousness, and strongly inclines to a negative answer, suggesting that the law should remain as it is, until alienists have established beyond any doubt not only the possibility of an irresistible impulse *strictissimo sensu*, but also a reliable criterion by which its existence can be ascertained, by ordinary judicial methods, with sufficient certainty (s).

In the meantime, "impulsive insanity is the last refuge of a hopeless defence" (t).

The undesirability of treating "moral imbecility" as a ground of exemption from conviction of crime, in the case of any offences but such as are of trifling importance, is recognised in the Mental Deficiency Act, 1913 (u).

One of the four classes of "defectives" liable to be dealt with under that Act comprises "moral imbeciles; that is to say, persons who from an early age display some permanent mental defect coupled with strong vicious or criminal propensities on which punishment has had little or no deterrent effect" (x).

Defectives "found guilty of any criminal offence" (y) are liable to be dealt with under the Act, and may so escape the ordinary punishment for their crime. In the case of any offence "punishable in the case of an adult with imprisonment or penal servitude" the defective may be so dealt with under an order of the Court (z); and in any case (e.g., upon conviction of a capital crime) he may also be dealt with "under an order of the Secretary of State" (a).

But the only instance in which a Court is authorised to deal with a defective against whom an offence is charged or proved "without proceeding to a conviction," is where the Court (being a Court of summary jurisdiction) has power to deal with the case summarily, under the ordinary law (b).

(s) Oppenh., 182—194; cf. Tayl., Princ., I., 817-820, 880-2.

(t) Per Darling, J., *R. v. Thomas*, 7 Cr. A. R. 36 (1911); cf. *R. v. Philpot*, ib. 140 (1912); *R. v. Smith*, 8 Cr. A. R. 72 (1912).

(u) 3 & 4 Geo. 5, c. 28.

(x) Sect. 1 (d).

(y) Sect. 2 (1) (b) (ii.).

(z) Sect. 4 (b); and as to procedure vide s. 8.

(a) Sect. 4 (c); and as to procedure, vide s. 9.

(b) Proviso to s. 8 (1).

II. COMPELSION BY HUMAN AGENCY.

Compulsion by mankind, in order to form an excuse under the principle of absence of volition, must be so complete as to leave no room for choice. In other words, the conduct in question must be that, not of the apparent agent (in whose favour the excuse is alleged), but of the person directing or controlling him.

(1) *Physical Compulsion.*

"If there be an actual forcing of a man, as if A. by force take the arm of B., and the weapon in his hand, and therewith stabs C., whereof he dies : this is murder in A., but B. is not guilty (c). But if it be only a moral force, as by threatening, duress or imprisonment, etc., this excuseth not" (d).

(2) *Innocent Agency.*

Another legitimate application of the excuse of compulsion arises in the case of innocent agency : where one person is employed by another to do an act which the former believes to be innocent, but which is in fact of a criminal character.

There is, however, under our law no excuse of agency apart from, or independently of, the total absence of *mens rea*, which brings the case of an innocent agent under the principle of absence of intentionality.

A man cannot successfully plead that, in respect of the conduct charged against him, he acted as an agent or in pursuance of the command or request of another person, unless he can show further that, having given such attention to his conduct as the law required of him, he believed what he did to be perfectly lawful (e).

The defence of innocent agency is, therefore, in reality only a particular application of the doctrine of *mens rea*, or intentionality—a fact which is best illustrated by reference to certain cases arising under the old law as to principals and accessories.

(c) Dalt., c. 145, p. 473 ; Plowd., Com., 19 a.

(d) Hale, I., 433.

(e) Vide *R. v. Knell*, 1 Barn., K. B. 305 (1728) ; *R. v. Sylvester*, 9 B. & C. 61 (1829) ; *R. v. James*, 8 C. & P. 131 (1837) ; *Wilson v. Stewart*, 32 L. J. M. C. 198 (1863).

Until certain inconveniences of the common law were remedied by the Principals and Accessories Act, 1861 (*f*), it was a matter of practical importance in prosecuting and indicting a felon, to decide whether his conduct was that of a principal, or that of an accessory; and in cases where the crime charged in an indictment was committed in the prisoner's absence, it frequently became necessary to distinguish, with the utmost nicety and care, between the guilt of a principal in the first degree, who commits the crime by an innocent agent (*g*), and the complicity of an accessory before the fact, who counsels, procures, or commands the commission (in his absence) of a felony by an accomplice (*h*).

The doctrine of the common law on this subject was well stated by Foster, who (after speaking of a principal in the second degree) wrote:—

“He must be present at the perpetration; otherwise he can be no more than an accessory before the fact, except in some special cases founded in necessity and political justice. I mean that justice which is due to the public, *ne maleficia remaneant impunita*.

“A., with intention to destroy B., layeth poison properly disguised in his way; B. taketh it and dieth. A., though absent when the poison was taken, is a principal: and if this had been done at the instigation of C., he if absent would have been no more than an accessory in the murder; unless they had both mingled the poison, and laid it in the way of B.; for in that case both of them would have been principals, each of them having gone as far as the other towards perpetration.

“If A. had prepared the poison, and delivered it to D., to be administered as a medicine, and D., accordingly, in the absence of A., had administered it *not knowing that it was poison*, and B. had died of it, A. would have been a principal in the murder, on the same foot of necessity; for, D. being innocent, A. must have gone wholly unpunished if he could not have been considered as a principal. But if D. had known of the poison, as well as A. did, he would have been a principal in the murder, and A., if absent, an accessory before the fact; for the rule of necessity already mentioned doth not here take place.

“The law is the same in the case of inciting a madman, or a child, not at years of discretion, to commit murder or other felony in the absence of the person inciting.” (*i*).

In *R. v. Manley* (*k*), the prisoner induced a boy of the age of nine

(*f*) 24 & 25 Vict. c. 94, ss. 1 and 2.

(*g*) St. Dig., art. 37; *R. v. Michael*, 9 C. & P. 356 (1840).

(*h*) St. Dig., art. 40; *R. v. Soares*, R. & R. 25 (1802).

(*i*) Fost., 349.

(*k*) R. & R. 104 (1844).

years to rob his father's till and give him the money. Upon an indictment of the prisoner for larceny as a principal, it was successfully urged on his behalf that he could not be convicted thereunder, if the child knew what he was doing; and he was acquitted under the direction of Wightman, J., who said :—

“ If you believe the story told by the child, you will have to determine whether that child was an innocent agent in this transaction; that is, whether he knew that he was doing wrong, or was acting altogether unconsciously of guilt, and entirely at the dictation of the prisoner, for if you should be of opinion that he was *not* an innocent agent, you cannot find the prisoner guilty as a principal under this indictment.”

Upon an indictment for forging a receipt, in the name of one William Smart, upon a money order for £5, it was proved that the prisoner wrote a letter, in that name, to an innocent agent, named Bartlett, desiring him to obtain payment of the money, and saying that Bartlett was “ at liberty to sign his hand ” to the order in question if necessary. Bartlett, under the belief that he was authorised so to do by William Smart, received the money, and transmitted £4 17s. 6d., the balance after deducting his expenses, to the prisoner. Upon these facts, Platt, B., having conferred with Pollock, C.B., said :—

“ We agree in thinking that, as Bartlett was an innocent agent, the signing the name William Smart by him is just the same as if it had been done by the prisoner himself; and that it is therefore a forgery ” (l).

In another case the prisoner was convicted of stealing large quantities of coal, by carrying the workings of his mine beyond the boundaries included in his lease; and Erle, J., directed the jury as follows :—

“ The prisoner did not, by his own hand, pick or remove the coal: but if a man does, by means of an innocent agent, an act which amounts to felony, the employer, and not the innocent agent, is the person accountable for that act ” (m).

The same considerations apply, where the innocent agent, though consciously performing the *actus reus* suggested to him by a guilty instigator, does so merely under the direction of the person intended to

(l) *R. v. Clifford*, 2 C. & K. 202 (1845).

(m) *R. v. Bleasdale*, ib. 765 (1848); cf. *R. v. Butcher*, 8 Cox, 77 (1858); *R. v. Dowe*, 11 Cox, 115 (1868), as to false pretences.

be defrauded by the proposed crime, and in an order to entrap the person instigating him. In such a case there is no guilty intent on the part of the agent, and the person instigating the crime is therefore the principal in the first degree.

In *R. v. Bannen* (n) the prisoner employed a die-sinker to manufacture, for a pretended innocent purpose, a die calculated to make shillings. The die-sinker, suspecting fraud, informed the Commissioners of the Mint; and, under their directions, made the die, for the purpose of detecting the prisoner. It was held that as the die-sinker was an innocent agent, the prisoner was rightly convicted as a principal.

The foregoing, and other cases bearing on the same rules of law, though concerned directly not with the conduct of the agent but with that of the instigator, have an important bearing on any excuse of innocent agency set up in defence to an indictment; for they show clearly that the law does not, as might possibly be inferred from some of the words used by Foster in the passage above quoted, apportion the blame between the person who suggests a crime and the person who under his direction carries it out, but that the sole point of importance is, whether the agent acted innocently in the strict meaning of the word. If, on the one hand, he knew or suspected himself, or ought to have known or suspected himself, to be committing or assisting in a crime, then he, and not the instigator, is the principal felon. If, on the other hand, after due enquiry, or with due attention to the circumstances, he was acting in entirely good faith, and did not comprehend the facts as falling under the law prohibiting the conduct in question, then the instigator is the principal and sole felon, as being in reality the only person upon whose wish or desire the commission of the offence depended.

In case of any degree of *mens rea* on the agent's part, the law treats him as an independent person: for, "if a person does an act of this kind with a guilty intent, he is not the agent of anyone" (o).

The rule that a servant or agent who can show *bona fides*, and entire absence of guilty intention or negligence, cannot be convicted in respect

(n) 2 Moo. 309 (1844); cf. *R. v. Valler*, 1 Cox, 84 (1844).

(o) Per Alderson, B., *R. v. Bull*, 1 Cox, 28 (1845).

of alleged unlawful conduct within the scope of his employment or authority appears never to have been departed from.

The considerations of public necessity, which have sometimes led the Courts to construe statutes as making masters responsible for their servants' acts in the absence of personal *mens rea* (*p*), do not seem to apply conversely, so as to necessitate a quasi-criminal responsibility on the part of a servant for acts innocently done by him under the orders or directions of his master.

In *Williamson v. Norris* (*q*) the respondent, a servant of the House of Commons, sold liquor, the property of the House, at a bar within the precincts of the House, to a person who was not a member of Parliament, and without any licence having been taken out for such sale. Upon a case stated it was held that the respondent was not guilty of an offence against the Act, and could not be convicted. Lord Russell, C.J., said :—

“ It is contended for the appellant that section 3 ought to be read as if the words ‘ without being duly licensed ’ were ‘ without being protected by a license ’ ; but that would be putting a violent gloss upon the words, and to do so is not necessary for the purpose of giving effect to the Act. . . . It is true that there are cases where the Legislature in its wisdom has declared that, in the particular class of cases dealt with, a man is to be treated as guilty of the offence in question, although he has not acted with negligence, and had no guilty mind. There are several such cases, but they form an exception to the general rule of law. The general rule of English law is, that no crime can be committed unless there is *mens rea*. . . . I am of opinion that if there was any offence at all, it was an offence committed by those who authorised the sale, and therefore the respondent is not liable to be convicted.”

A somewhat similar question arose, in another case, upon the construction of sec. 29 of the Weights and Measures Act, 1889, which provides that an inspector may enter any building where coal is kept for sale, or may stop any vehicle carrying coal for sale or delivery to a purchaser, and weigh any quantity of coal found ; and if it appears that any quantity of coal so weighed is of less weight than that represented by the seller, the person selling or keeping or exposing the coal for sale, *or the person in charge of the vehicle, as the case may be,*

(*p*) *Infra*, “ (3) Responsibility for Servants' Acts.”

(*q*) 1899, 1 Q. B. 7, under the Licensing Act, 1872, s. 3 ; see now Licensing (Consolidation) Act, 1910, s. 65.

is liable to a fine. A servant in charge of a vehicle innocently delivered therefrom, to customers, coal of less weight than that represented by his employers, having himself no knowledge of any short weight. He was convicted by the justices, on the ground that he was the person in charge of the vehicle, and that his contention, to the effect that he was merely an innocent agent, was incorrect, he being able to protect himself by seeing that the sacks of coal were of the proper weight, before taking them out of the yard. Upon a case stated, the conviction was quashed, Lord Alverstone, C.J., saying:—

“ It is a general principle of the criminal law, that a man is not to be convicted of a crime if he has no *mens rea*. There are no doubt a number of exceptions to that rule, which are based upon the terms of particular statutes, for example, certain offences under the Licensing Acts, and the Sale of Food and Drugs Act. But this Act creates no exception to the general rule. . . . To come within the scope of the Act, the person in charge of the vehicle must be selling, keeping or exposing the coal for sale. The words, ‘ as the case may be,’ were inserted to cover the case where a representation has been made by a person who is not himself the owner of the coal, but who is acting as an agent in selling or exposing it for sale, and is sent out by the coal merchant, not merely to deliver coal which without the agent’s knowledge is in fact of less weight than that represented, but to make a representation himself as to the weight of the coal he is selling, and to sell coal of less weight than that represented by himself ” (r).

In some cases, however, where servants have been unable to prove that their personal conduct was in entirely good faith and without culpable negligence, so as to make out a good defence by reason of the absence of *mens rea* on their part, it has, in connection with certain statutory offences, been found necessary to consider a rather more difficult question—viz., whether the statute prohibits the servant himself from committing the particular acts in respect of which he is charged, or whether its operation is confined to prohibiting a general course of action on the part of the master only, so that the servant could not in any case commit the crime in question, although the particular acts performed by him may involve his master in criminal or quasi-criminal liability.

The cases in question have arisen upon the construction of various

(r) *Paul v. Hargreaves*, 1908, 2 K. B. 289; cf. *Roberts v. Woodward*, 25 Q. B. D. 412 (1890).

provisions contained in the Sale of Food and Drugs Act and the Licensing Acts.

In *Hotchin v. Hindmarsh* (s) a servant of a dairy company who sold his master's milk to a customer was held to be a seller within the meaning of sect. 6 of the Sale of Food and Drugs Act, 1875, which provides under a penalty that "no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance and quality of the article demanded by such purchaser." The milk was supplied to the dairy company by a third party, under a written agreement whereby it was warranted pure. The defendant did not test the milk in question on receiving it, although he had an instrument for the purpose, and frequently tested milk so received by him. Lord Coleridge, C.J., said :—

"In my opinion a person who takes the article in his hand and performs the physical act of transferring the adulterated thing to the purchaser, is a person who sells, within this section."

Mathew, J., said :—

"It is clear from the series of sections following section 6 that the Legislature meant to deal with the person who does the physical act. Thus, in section 17, it is plain that the person exposing the article for sale may be either the principal or the agent. It would be an extraordinary interpretation of the Act to hold that even where it was shown that the person who did the act was guilty, his employer alone should be liable to be convicted."

In *Commissioners of Police v. Cartman* (t), where the point directly in issue was the quasi-criminal responsibility of the master for his servant's acts, the Court had to construe a different kind of enactment, imposing stringent duties upon a specified class of persons (of whom the master was one) in the conduct of their business. The enactment in question was sect. 13 of the Licensing Act, 1872 (u), which inflicted certain penalties "if any *licensed person* . . . sells any intoxicating liquor to any drunken person." The decision of the Court, holding the master liable for his servant's acts, was grounded partly on the impossibility of holding the servant himself liable under an enactment the operation of which was

(s) 1891, 2 Q. B. 181.

(t) *Infra*.

(u) Now sect. 75 (1) of the Consolidation Act, 1910.

expressly confined to "licensed persons," Lord Russell, C.J., remarking that "there was no machinery by which the person actually selling can be convicted; a penalty can only be inflicted on the licensee."

Boyle v. Smith (v) was another case where the question in dispute was the quasi-criminal liability of the master; but here the enactment (x) was of a general description (binding not a particular class of persons only, but everybody) against selling liquor without a licence; and the following observations on the position of the servant were made by Lord Alverstone, C.J. :—

"It was said that *Williamson v. Norris* (y) decided that a servant could not be prosecuted for a sale of this kind. In my opinion that case does not go so far as that, and I do not think that the Court intended to decide anything of the kind. What was decided, as an inference of fact drawn by the Court, was that there was no sale by the respondent, but by the Kitchen Committee of the House of Commons. I have no hesitation in saying that, in my opinion, if a servant in such a case chooses himself to make a contract and sell liquor, he is liable to a penalty under section 3" (z).

In other words, the distinction between *Williamson v. Norris* and *Boyle v. Smith* is that between the case of a servant acting without *mens rea* and the case of a servant selling on his own account, or otherwise knowingly contravening the statute.

The foregoing cases have been recently considered by the Court of Criminal Appeal in *Caldwell v. Bethell* (a), where a summons against a barman, for selling less than half a pint of draft liquor otherwise than by standard measure, contrary to the Licensing (Consolidation) Act, 1910 (b), had been wrongly dismissed by the stipendiary magistrate, on the ground that no one but the licensee could be guilty of that offence. The respondent, who was employed by a licensee on licensed premises, served a woman with a small quantity of beer in a jug without measuring it, the licensee being absent at the time and having no knowledge of the transaction. The Court referred the case back to the magistrate, to hear again, and Lord Alverstone, C.J., said :—

(v) *Infra*.

(x) Sect. 3 of the Licensing Act, 1872; now sect. 65 of the Act of 1910.

(y) *Supra*.

(z) Cf. *Stansfield v. Andrews*, 25 T. L. R. 259 (1909), per Walton, J.

(a) 1913, 1 K. B. 119.

(b) 10 Edw. 7 & 1 Geo. 5, c. 24, s. 69 (2).

"The section before us is one which deals with the physical act of drawing liquor from a larger vessel into a smaller, measuring it, and handing it over to the customer, and that is an act which in ninety-nine cases out of a hundred, certainly in the larger public-houses, would be done by the servant and not by the licensee himself. It enacts that an offence shall be committed by any person who sells in contravention of its provisions, and secondly by any one who suffers any other person under his control so to sell; and if the word 'sell' were there confined to the transfer of the property in the liquor by the person to whom it belongs the latter limb would have no meaning. Therefore, I come to the conclusion that the offence of selling liquor without measuring it may be committed by persons other than the one whose property it is."

Avory, J., made the following comment upon the other cases referred to above :—

"I think that this case ought to be decided upon the same principle as that which was acted upon by the Court in *Hotchin v. Hindmarsh* (c), and there applied to similar words in the Sale of Food and Drugs Act, namely, that the person who performs the physical act of transferring the thing to a purchaser is a person who sells within the meaning of the section. In so deciding we are not, in my opinion, deciding contrary to any previous case. With regard to *Williamson v. Norris* (c), I think that the whole pith of that case is to be found in the sentence of Lord Russell's judgment where he says 'I am of opinion that the true meaning of the section'—section 3 of the Licensing Act, 1872—'is that the sale which is prohibited must be a sale by the person who ought to be licensed.' I think that those words have no application to the section before us, and that the magistrate was wrong in the view that he took. With regard to *Commissioners of Police v. Cartman* (c), when one comes to look at the section under which the respondent was charged, it is clear that the offence was one which could only be committed by the holder of licence."

(3) *Responsibility for Servants' Acts.*

The principle of compulsion, or absence of volition, is that upon which is founded the general rule that a master is not liable criminally for the unlawful acts, neglects or defaults of his servants, committed without his authority or privity (d). He is not liable, because the doing

(c) *Supra*.

(d) *R. v. Huggins*, 2 Ld. Raym. 1574; Ken. S. C., 35 (1730); *Woodgate v. Knatchbull*, 2 T. R. 148 (1787).

or not doing of the act in question depended, not upon his choice or desire, but upon that of the servant; and—

“In all cases where a man does that act which makes a thing to be what it is, he is, and must be construed to be, the doer of that thing” (e).

Qui facit per alium facit per se is a maxim of criminal as well as of civil law (f); but a great difference arises in respect of its application thereto (g).

“It is a well-established distinction, that while a man is civilly responsible for the acts of his agent, when acting within the established limits of his authority, he will not be criminally responsible for such acts, unless express authority be shown, or the authority is necessarily to be implied from the nature of the employment. . . . Under ordinary circumstances, the authority of the agent is limited to that which is lawful. If in seeking to carry out the purpose of his employment he oversteps the law, he outruns his authority, and his principal will not be bound by what he does” (h).

For the purpose of securing the conviction of a master or principal, therefore, the criminal acts committed by his servant or agent must ordinarily be shown to have been so committed either with his express authority or sanction, or else in such circumstances that his privity can fairly be gathered or inferred from the facts proved (i).

“I know of no instance in which a master is criminally liable for the act of his servant, unless he is made so by statute, or unless the act of the servant is, from its very nature, obviously the act of the master. . . . In the case of a servant selling an indecent book, it would be presumed to be the act of the master, who was keeping indecent books for sale; and the liability of a master for the act of his servant in supplying drink to a constable on duty arises, not by virtue of an express statutory enactment that he should be liable, but because to permit him under such circumstances to avail himself of a plea that he was ignorant of his servant's acts would be contrary to the whole spirit of legislation on the subject” (k).

(e) Per Holt, C.J., *R. v. Bear*, 2 Salk. 417 (1698), cit. *Maloney v. Bartley*, 3 Camp. 210, at p. 212 (1812).

(f) Vide Bac. Max. 16; *R. v. Cooper*, 8 Q. B. 533 (1846); *Parkes v. Prescott*, L. R. 4 Ex. 169, per Byles, J., at pp. 182-3 (1878).

(g) *Harrison v. Leaper*, 26 J. P. 373, 386 (1862).

(h) Per Cockburn, C.J., *Wilson v. Rankin*, 34 L. J. Q. B. 62, 67 (1865); cf. per Lord Wensleydale, *Cooper v. Slade*, 6 H. L. Cas. 793; 108 R. R. 292 (1858).

(i) *Wilson v. Stewart*, 32 L. M. C. 198 (1863).

(k) Per Pollock, B., *Robert's v. Woodward*, 25 Q. B. D. 412, 415.

Before the exceptions to this rule are examined, two or three important cases must be noticed, in which the general principle has been recognised and applied.

By sect. 10 of the Mines Regulation Act, 1860 (*l*), it was provided that certain general rules should be observed in every coal mine by the owner and agent thereof, including a rule that safety lamps should be examined and locked by a person duly authorised for that purpose. By sect. 22 a penalty was imposed on the owner or agent if, through the default of such owner or agent, any of such general rules as aforesaid were neglected or wilfully violated. In *Dickinson v. Fletcher (m)* the owner of a mine appointed a competent person, but the latter delivered out certain lamps to miners unlocked. It was held that, in the absence of any personal default on the part of the owner, he was not liable to a penalty in respect of the act of the person employed by him :—

“I think the subsequent legislation on the subject fortifies the view that I take of the construction of the former Act. It is provided by 35 & 36 Vict. c. 76 (*n*), in several of the sections of that Act, that in the event of any contravention of the provisions of the Act, the owner, agent and manager of the mine shall each be guilty of an offence against the Act, unless he proves that he had taken all reasonable means to prevent such contravention. This is an explicit enactment *in pari materia*, and it appears to me to support the view which the Court takes of the intention of the Legislature in 23 & 24 Vict. c. 151. For these reasons I am of opinion that the magistrates were right in refusing to convict” (*o*).

“We are called upon to construe a penal enactment. Those who contend that the penalty may be inflicted, must show that the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail, if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty” (*p*).

“The general principle on which penal statutes imposing a penalty for neglecting to do any act must, in the absence of distinct words to

(*l*) 23 & 24 Vict. c. 151; see now Coal Mines Regulation Acts, 1887 to 1908.

(*m*) L. R. 9 C. P. 1 (1873); cf. *Howells v. Wynne*, 32 L. J. M. C. 241 (1863); also *R. v. Handley*, 9 L. T. N. S. 827 (1864), under 5 & 6 Vict. c. 99, ss. 8 and 13.

(*n*) Vide *Baker v. Carter*, L. R. 3 Ex. D. 132 (1878); see now 50 & 51 Vict. c. 58, ss. 49, 50.

(*o*) Per Keating, J.

(*p*) Per Brett, J.

the contrary, be construed is, that by neglect something in the nature of personal or wilful neglect is meant. . . . It would be straining the words of this Act, as it seems to me, far beyond the limits which the general rules of law and the decisions have laid down in the case of penal enactments; to say that under the mere word *neglect* a person is to be liable to penal consequences for what was wholly the fault of someone in his employ, and not in any way his fault" (q).

Again, it is provided by sect. 56 of the Highways Act, 1835 (r) that if a surveyor shall lay or cause to be laid any heap of stone or other matter or thing upon any highway, and allow the same to remain there at night to the danger or personal damage of any person passing thereon, all due and reasonable precautions not having been taken by the said surveyor to guard against the same, he shall forfeit a sum not exceeding £5. In *Hardcastle v. Bielby* (s) a cart was injured through contact with a heap of stone which had been allowed to remain after nightfall on a highway. The stone had been laid there by a carter who acted under the orders of a person to whom the surveyor had given general directions as to repairing the road, but the surveyor did not himself know that the stone had been laid there. Upon these facts, it was held that there was no evidence of an offence by the surveyor within the meaning of the section. An analogy to *Bond v. Evans* (t) was suggested in argument, and it was urged that the object of sects. 55—57 was the protection of the public against arbitrary or negligent conduct by surveyors; that those sections did not, like sect. 72, contain the word *wilfully*; and that the meaning of sect. 56 appeared to be, that where a heap of stone was left on the highway at night, a presumption of negligence arose against the surveyor of the district. Hawkins, J., however, said :—

"I need not express an opinion upon the abstract problem which we are invited to solve. I can conceive circumstances under which a surveyor might be liable to a penalty under the section for having left stones on the highway at night, although there was no evidence that he personally knew that they had been left there. Whether he would or would not be so liable in any particular case must depend upon the course

(q) Per Denman, J.

(r) 5 & 6 Will. 4, c. 50.

(s) 1892, 1 Q. B. 709.

(t) *Infra*.

of business as between the surveyor, the district board, and the men employed to mend the roads. But in the present case there is no evidence that the appellant either 'caused the stones to be laid on the highway' or 'allowed them to remain at night upon the highway,' so as to cause danger. . . . My judgment has no general application, but is confined to the circumstances of this particular case."

Collins, J., said :—

"As regards the first offence, I see nothing in the terms of the section to indicate that it can be committed unless the laying of the stones on the highway is proved to have been in some sort the act of the surveyor. There must be evidence that the stones were laid upon the highway by his authority. As to the second offence, there is rather more difficulty. The word *allow* seems to admit the consideration whether or not the offence can be committed where negligence on the part of the surveyor has been proved, although he may not have been proved to have any personal knowledge that the acts which have caused the injury have taken place. It is unnecessary, however, to decide this question, because in this case there is absolutely no evidence of negligence on the part of the surveyor. It would be monstrous to hold that a man may be fined under the statute because an accident has happened, which it was impossible for him to prevent for the simple reason that it was impossible for him to find out that the circumstances which led to the accident had occurred, and therefore impossible for him to take the precautions which are enjoined upon him by the statute. Anyone would shrink from construing a statute in such a way as to make such a conviction possible."

Under sect. 28 of the Merchant Shipping Act, 1876 (*u*), any owner or master of a British ship who allowed the vessel to be overloaded to a specified degree was liable to a penalty not exceeding £100. In *Massey v. Morriss* (*x*) the Court quashed the conviction of a shipowner under this section, for the overloading of his ship by the master, without his knowledge or assent :—

"Did the defendant allow the ship to be so loaded? There is no evidence whatever that he did so, unless the mere fact that he appointed the master, who allowed it to be done, amounted to an *allowing* of it by himself. But I do not think that that could possibly have been the intention of the Legislature. Of course, there may in some cases be circumstances from which you may fairly draw the conclusion that

(*u*) 39 & 40 Vict. c. 80; see now the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 442.

(*x*) 1894, 2 Q. B. 412; cf. *Wilson v. Rankin*, L. R. 1 Q. B. 162 (1865).

the owner appointed a particular master knowing that he would overload the ship, and intending that he should do so; but there is no evidence of any such circumstances here. There is nothing beyond the bare fact that the appellant appointed the master, and that is not enough. Reference has been made to the alehouse cases. But the explanation of those cases is this: licences to keep alehouses are only granted to persons of good personal character, and it is obvious that the purpose of so restricting the grant of licences would be defeated if the licensed person could, by delegating the control and management of the house to another person who was altogether unfit to keep it, free himself from responsibility for the manner in which the house was conducted. The cases are not analogous" (y).

Similar principles apply to offences by omission: e.g., a master cannot be criminally liable for the failure of his servant to comply with a statutory order for the disinfecting of his cattle, if he (the master) be unaware of the promulgation of such order, and guilty of no negligence or culpable inattention (z). But in some cases, and for some purposes, e.g., "stamp-licking," (a) a positive duty may be imposed upon a person by statute in such a manner as, though not to necessitate the performance thereof by him *in propria persona*, yet to put him upon his peril as to the performance thereof by his servants or deputies. Such cases are exceptional, and approximate closely to quasi-crime.

It has been suggested, as a moot point (b), that criminal liability may conceivably be assumed by mere ratification of, as distinct from participation in, a criminal act; or, in other words, that the maxim *omnis ratihabitio retrotrahitur et mandato priori æquiparatur* (c) may be applicable to criminal law, as well as to the law of contract and tort.

In *R. v. Woodward* (d), where the prisoner's wife received stolen goods on his behalf without his authority or knowledge, and the prisoner

(y) Per Cave, J.

(z) *Searle v. Reynolds*, 7 B. & S. 704, per Cockburn, C.J. (1866); cf. *Caswell v. Hundred House Justices*, 54 J. P. 87 (1890), as to not admitting constable to licensed premises.

(a) *Godman v. Crofton*, 78 J. P. 133 (1914), under the National Insurance Act, 1911, ss. 4 (2), 7, and 69 (2), and the National Health Insurance (Collection of Contributions) Regulations (England) (1913), rr. 3, 6.

(b) Broom, Leg. Max., 660.

(c) Co. Litt. 207 a.

(d) L. & C. 122 (1862); cf. *Ex. v. Dring*, D. & B. 329 (1857), where the husband's conviction was quashed for ambiguity.

afterwards met the thief and agreed the price with him, his conduct in so doing was held to amount to something more than mere passive ratification, and he was held to have been properly convicted, as having, by completing the transaction, taken an active part in the offence of receiving the stolen goods.

The notion that an offence of any kind can be committed by mere ratification, after the event, is so utterly opposed to the doctrines underlying the criminal liability of principals and accessories, that it need hardly be seriously discussed. The only shadow of authority to be found for it is an *obiter dictum* of Lord Wensleydale, in a case of corrupt practices by a person acting on behalf of a parliamentary candidate :—

“ I take it to be a clear proposition of law, that if a man employs an agent for a perfectly legal purpose, and that agent does an illegal act, that act does not affect the principal unless a great deal more is shown : unless it is shown that the principal directed the agent so to act, or afterwards ratified the illegal act, or that he appointed one to be his general agent to do both legal and illegal acts ” (e).

The context (f) seems to show that Lord Wensleydale was here referring to some possible act of ratification or expression of approval on the part of the principal, which might afford evidence of the existence of some prior authority or actual connivance on his part (g).

The exceptions which have been made to the general rule of a master's non-liability for his servant's criminal acts follow, in the main, the same lines as exceptions to the doctrine of *ignorantia facti* (h).

In the first place, common nuisances, and certain statutory offences in the nature of nuisances, form an important class of exceptions from the doctrine of volition, as well as from the doctrine of intentionality.

In *R. v. Medley* (i) the directors of a gas company, together with the superintendent and engineer, were indicted for a nuisance in permitting the refuse of gasworks to be conveyed into a public river. It was

(e) *Cooper v. Slade*, 7 H. L. Cas. 746, 793 (1858).

(f) Vide p. 794.

(g) Cf. *M'Kenzie v. British Linen Co.*, 6 A. C. 82, per Lord Blackburn, at p. 99.

(h) *Ante*, Chap. II.

(i) 6 C. & P. 292 (1834) ; cf. *Mitchell v. Brown*, 23 L. J. M. C. 53 (1858), under 54 Geo. 3, c. 159, s. 11.

proved that the directors left the management of the works to the superintendent, who directed the engineer, and that the latter gave orders to the rest of the workmen. Lord Denman thus directed the jury:—

“ It is said that the directors were ignorant of what had been done. In my judgment, that makes no difference; provided you think that they gave authority to the superintendent to conduct the works, they will be answerable. It seems to me both common sense and law, that if persons, for their own advantage, employ servants to conduct works, they must be answerable for what is done by those servants.”

In *R. v. Stephens* (*k*) it was held that the owner of works carried on for his profit by his agents is liable to be indicted for a public nuisance caused by acts of his workmen in carrying on the works, though done by them without his knowledge and even contrary to his general orders. The defendant was the owner of large slate quarries near a river, and was indicted for obstructing navigation by casting large quantities of slate rubbish into the river. He was over eighty years old, and unable personally to superintend the working of the quarry, which was managed for his benefit by his sons. The workmen had been prohibited both by the defendant and by his sons from depositing the rubbish in the river. A rule was obtained for a new trial, for misdirection to the effect above stated, but was discharged by Mellor, Shee, and Blackburn, JJ. :—

“ It is quite true that this, in point of form, is a proceeding of a criminal nature, but in substance I think it is in the nature of a civil proceeding. . . . There may be instances of such a character that the rule I am applying here would not be applicable to them, but here it is perfectly clear that the only reason for proceeding criminally is that the nuisance, instead of being merely a nuisance affecting an individual, or one or two individuals, affects the public at large, and no private individual, without receiving some special injury, could have maintained an action. Then, if the contention of those who say the direction is wrong is to prevail, the public would have great difficulty in getting redress. The object of this indictment is to prevent the recurrence of the nuisance. The prosecution cannot proceed by action, but must proceed by indictment, and if this were strictly a criminal proceeding the prosecution would be met with the objection that there was no *mens rea*: that the indictment charged the defendant with a criminal offence, when in

(*k*) L. R. 1 Q. B. 702 (1866).

reality there was no proof that the defendant knew of the act, or that he himself gave orders to his servants, to do the particular act he is charged with" (l).

"I only wish to guard myself against its being supposed that, either at the trial or now, the general rule that a principal is not criminally answerable, for the act of his agent, is infringed. All that it is necessary to say is, that when a person maintains works by his capital, and employs servants, and so carries on the works as in fact to cause a nuisance to a private right, for which an action would lie, if the same nuisance inflicts an injury upon a public right, the remedy for which would be by indictment, the evidence which would maintain the action would also support the indictment" (m).

Where, however, a particular act or omission, although in the nature of a nuisance, is rendered punishable by the infliction of a statutory penalty, the question whether personal *mens rea* is essential to liability is governed by the ordinary rules as to the construction of penal statutes, and not by the considerations which arise upon an indictment for a common law nuisance.

Thus, in *Chisholm v. Doulton* (n), where the defendant was personally guilty of no negligence, but his stoker carelessly used a furnace so as to emit smoke, and the master was summoned for having negligently used a furnace so that smoke was not effectually consumed (o), it was held that personal *mens rea* on the defendant's part was an essential ingredient in the offence :—

"Though the Legislature undoubtedly may enact, as in the case of certain of the offences under this very Act it has enacted, that persons shall be criminally responsible for the doing of particular acts, even though they have no guilty mind in doing them, yet it is for the prosecution in each case to make out clearly that the Legislature has in fact so enacted" (p).

"It lies on those who assert that the Legislature has so enacted to make it out convincingly by the language of the statute; for we ought not lightly to presume that the Legislature intended that A. should be punished for the fault of B." (q).

(l) Per Mellor, J.

(m) Per Blackburn, J.

(n) 22 Q. B. D. 736 (1889).

(o) Under the Smoke Nuisance (Metropolis) Act, 1853, s. 1 (now 54 & 55 Vict. c. 76).

(p) Per Field, J.

(q) Per Cave, J.; cf. *Wilcocks v. Sands*, 32 J. P. 565 (1868), under a Local Improvement Act; *R. v. Bennett*, ante, Chap. VII.

On the other hand, under an Act making it an offence *either* to use a furnace or fireplace which does not so far as practicable consume the smoke, *or* to use a chimney (not of a dwelling-house) which sends forth black smoke so as to be a nuisance, a master cannot shelter himself behind the negligence of his servant in respect of the latter offence (*r*). Where, therefore, the owners of a mill which on several occasions sent forth black smoke were summoned for that offence, but the summons was dismissed because the furnaces were properly constructed and the defendants had exercised reasonable and proper supervision, and the nuisance was found to have arisen solely through the negligence of the stokers, without any negligence on the part of the defendants or their foreman, it was nevertheless held that the justices ought to have convicted (*s*).

Secondly, the various provisions of statutes relative to the adulteration of food and regulation of the sale of goods, which have been seen to create quasi-crimes in derogation from the principle of intentionality, have the effect also of making a master liable quasi-criminally in respect of the acts or defaults of his servants, without any degree of privity on his part.

Thus, in *Brown v. Foot* (*t*), it was held that a master milkseller may be convicted of selling adulterated milk (*u*), although it was adulterated by his servant without his knowledge or connivance, and was quite pure when entrusted to the servant for sale :—

“The master must be taken to be the seller of the milk, though the person who actually sells and delivers the milk may also be liable. . . . The master is liable to be convicted under this Act, unless he brings himself within any of the exemptions in section 25. The sixth section says that no person shall sell any article of food adulterated not ‘knowing it to be so.’ Any such words are carefully excluded, and there might be good reason for it. . . . *Betts v. Armistead* (*x*) seems to me to settle the question; and then there is the case of *Pain v. Boughtwood* (*x*). It is not necessary, therefore, to show any connivance on the part of

(*r*) Public Health Act, 1875, s. 91.

(*s*) *Niven v. Greaves*, 54 J. P. 548 (1890), following *Barnes v. Akroyd*, L. R. 7 Q. B. 474 (1872).

(*t*) 8 T. L. R. 268 (1892); cf. *Houghton v. Mundy*, 74 J. P. 377 (1910), overruling *Kearley v. Tylor*, 65 L. T. N. S. 261 (1891).

(*u*) 38 & 39 Vict. c. 63, s. 6.

(*x*) *Ante*, Chap. II.

the master, and there is no reason why the master should not be liable for the act of his servant, for it is only for a penalty ; it is not a criminal offence. A penalty is imposed with a view to preventing the adulteration. It is not a question as to connivance ; it is the sale of adulterated milk which incurs the penalty. The language of Lush, J., in *Core v. James* (y), as to the use of ingredients adulterating bread, supports this view, and the principle there laid down is applicable to the present case " (z).

" There was a positive prohibition of the sale of adulterated milk, and that implied that the master-seller shall take care not only not himself to sell it, but also that it is not sold by anyone whom he employs." In this case the servant was employed generally to sell milk for his master, and there would be no reason to relieve the master from liability under the Act merely because he does not personally sell the milk. He is also to take care that the persons he employs do not sell it adulterated, and if they do, then he breaks the Act, and is liable " (a).

Under this section the act of a stranger, or at any rate an independent agent not in the employ of the defendant, appears to be sufficient to render the defendant liable as for a criminal offence.

In *Parker v. Alder* (b), where the respondent contracted to supply pure milk at Paddington, and duly delivered the milk in a pure condition to the servants of the railway company at Challow Station, but without his knowledge or consent it was adulterated during the transit by railway to Paddington, he was held by Lord Russell, C.J., and Wills, J., to have been properly convicted :—

" There is, as it seems to me, no material distinction between the case of adulteration by a servant without the authority and against the express orders of his master, and adulteration by the fraudulent act of a stranger. The legislation on the subject was intended to be drastic, and the offence was created quite independently of the moral character of the act. I feel no doubt that Paddington was the place of delivery, and that the railway company were acting in carrying the milk as the agents of the respondent. That really disposes of the case. . . . By section 16 of the Summary Jurisdiction Act, 1879, the magistrate has power to discharge the accused without punishment if he considers the offence to be in the particular case of so trifling a nature that it is inexpedient to inflict any punishment " (c).

(y) *Ante*, Chap. VII.

(z) Per Hawkins, J.

(a) Per Wills, J.

(b) 1899, 1 Q. B. 20 ; contrast *Booth v. Helliwell*, 78 J. P. 223 (1914), as to non-liability of shareholder in a " one-man company."

(c) Per Wills, J.

In *Farley v. Higginbottom* (d) a master was held to have been rightly convicted in respect of the unlawful conduct of his manager, in his absence, in refusing to sell to a police constable some coffee required for analysis (e), and Wright, J., said :—

“An employer is liable for the act of his servant in such a case as this, upon the well-known principle that where the gist of the offence is not in reality criminal then the master may be held liable. It seems to me that these Food Adulteration Acts could not be worked, if persons who keep shops were not to be held liable for acts done by their servants in carrying on the ordinary course of the business.”

The same considerations which have led to the arbitrary construction of the Food and Drugs Acts have been applied to the creation of quasi crime under some other statutes restrictive of the sale of goods.

Under sect. 2 (2) of the Merchandise Marks Act, 1887, every person who sells, exposes for sale, or has in his possession for sale, trade or manufacture, anything to which a forged trade mark or false trade description is applied, is guilty of an offence, unless he proves (*inter alia*) that, having taken all reasonable precautions, he had no reason to suspect the genuineness of the mark or description, or that otherwise he had acted innocently. In *Coppen v. Moore* (No. 2) (f)—“a case of great importance and no little authority” (g)—the appellant carried on business at various shops called the London Supply Stores. Outside one of these shops his salesman pointed out to a customer, as Scotch hams, some hams which were in fact American; and the customer having selected one, the salesman passed it through the window to a shop assistant inside, saying “Weigh up Scotch ham, 8½d.” Upon being persistently requested by the customer so to do, the assistant handed him an invoice describing the ham as Scotch; but, upon being asked whether he still said it was Scotch, he admitted that it was American. The salesman in like manner was asked, and at once admitted, that it was an American ham. In spite of the facts that the appellant had sent out to all his branch places of business a notice marked “most important,” to the effect that the hams in question must be sold simply as breakfast hams, and not under any

(d) 42 Sol. J. 309 (1898).

(e) Under 38 & 39 Vict. c. 63, ss. 13, 17.

(f) 1898, 2 Q. B. 306.

(g) Per Sir Ford North in *Commissioner of Trade and Customs v. Bell & Co.*, 1902, A. C. 563.

specific name of place or origin, that this notice was duly proved to have been communicated to the manager and assistants, and that the appellant stated he had no reason to believe that his instructions were not being carried out, it was held that he was properly convicted under the section above quoted :—

“The question then in this case seems to be narrowed down to the simple point, whether upon the true construction of the statute here in question the master was intended to be made criminally responsible for acts done by his servants in contravention of the Act, where such acts were done, as in this case, within the scope or in the course of their employment. In our judgment it was clearly the intention of the Legislature to make the master criminally liable for such acts, unless he was able to rebut the *prima facie* presumption of guilt by one or other of the methods pointed out in the Act. Take the facts here, and apply the Act to them. To begin with, it cannot be doubted that the appellant sold the ham in question, although the transaction was carried out by his servants. In other words, he was the seller, although not the actual salesman. It is clear also, as already stated, that the ham was sold with a *false trade description* which was material. If so, there is evidence establishing a *prima facie* case of an offence against the Act having been committed by the appellant. But it is only a *prima facie* case. . . . What is material to note is that the magistrates do not appear to have been asked to find, and certainly they do not in fact find, that the appellant had acted innocently within the meaning of clause (c). There was evidence before them that the American hams in question were dressed so as to deceive the public, and this probably explains the absence of the finding that the appellant had acted innocently. . . . It is obvious that, if sales with false trade descriptions could be carried out in these establishments with impunity so far as the principal is concerned, the Act would to a large extent be nugatory. We conceive the effect of the Act to be to make the master or principal liable criminally (as he is already, by law civilly) for the acts of his agents and servants in all cases within the section with which we are dealing, when the conduct constituting the offence was pursued by such servants and agents within the scope or in the course of their employment, subject to this : that the master or principal may be relieved from criminal responsibility where he can prove that he had acted in good faith and had done all that it was reasonably possible to do to prevent the commission by his agents and servants of offences against the Act ” (h).

So also, the Weights and Measures Act, 1878 (i), “is within the class

(h) Per Lord Russell, C.J.

(i) 41 & 42 Vict. c. 49, s. 25 ; secus the Act of 1889 (52 & 53 Vict. c. 21), s. 29 ; vide *Roberts v. Woodward*, 25 Q. B. D. 412 (1890).

of statutes under which persons may be convicted for acts of their servants in respect of which they are not in any real sense culpable. *Mens rea* is not an element in the offence. . . . The offence is within that class where the legislature has absolutely prohibited certain acts being done, with the consequence that if they are done, although by a servant of the employer—done in any sense in the course of the employment, so that for some purposes the maxim *qui facit per alium facit per se* applies—the employer may be convicted, although he is not in anyway morally culpable” (k).

Thirdly, the numerous cases in which the possibility of quasi-crime *per alium* under the Licensing Acts has been recognised by the Courts involve the construction of statutory prohibitions concerning: (i.) the sale of liquor without a licence, or in a prohibited manner; (ii.) sale to intoxicated persons; (iii.) sale to constables on duty; (iv.) sale to children; and (v.) suffering the carrying on of gaming on licensed premises.

(i.) With reference to the sale of liquors, etc., without a licence, it was held in *Newman v. Jones*, where the trustees and members of the committee of a club had been convicted (l) of selling some tobacco and liquors, without a proper licence, to persons not members of the club, that the conviction must be quashed, because the appellants were not, under the circumstances, responsible for the acts of the club steward, who, in actually selling the liquor, had acted contrary to their orders and without their knowledge or consent—although the money received for the liquor was actually paid into the club’s account (m).

In *Boyle v. Smith* (n) the respondent held a licence to sell beer by

(k) Per Channell, J., *Anglo-American Oil Co., Ltd. v. Manning*, 1908, 1 K. B. 536, at p. 541.

(l) Under 6 Geo. 4, c. 81, s. 26; 4 & 5 Will. 4, c. 85, s. 17; and 23 & 24 Vict. c. 27, s. 19; all repealed by Finance (1909-10) Act, 1910, s. 96 (1); see now Licensing (Consolidation) Act, 1910, s. 65; and as to Clubs, ss. 91—98 and Finance (1909-10) Act, 1910, s. 48.

(m) 17 Q. B. D. 132 (1886); followed in *Inland Revenue v. Cardiff Conservative Club Co.*, 58 J. P. 120 (1894); et vide *Allen v. Lumb*, 57 J. P. 377 (1893).

(n) 1906, 1 K. B. 432; 75 L. J. Q. B. 282; cf. *Stansfield v. Andrews*, 25 T. L. R. 259 (1909), where the drayman’s employers were convicted of aiding and abetting him.

retail at the premises of a brewery company. He gave orders to the draymen not to deliver beer unless an order for it had been previously received by the company at their office, and he took every care to prevent any infringement of this order. One of the draymen, however, being upon his round, sold beer in the street to persons who had sent no order, and received payment from them. Upon a case stated, it was held that the magistrate had rightly dismissed the summons (o) against the respondent for having sold intoxicating liquor at a place where he was not authorised to sell it because the sale was not within the general scope of the drayman's employment:—

“In my opinion, the magistrate has taken the correct view of the law applicable to the case: that the respondent is not liable. He cannot, I think, be held liable because the drayman whom he has sent out to deliver beer to customers sells it contrary to his orders. This is not a case of delegated authority within the class of cases of which *Bond v. Evans* and *Commissioners of Police v. Cartman* (p) are instances. The business must be carried on in this way, for it cannot be suggested that the respondent should go out and deliver the beer himself. It seems to me that, the facts showing that the drayman had no authority to do what he did, and that he was expressly forbidden to do it, there was not a sale by the respondent, within the meaning of section 3” (q).

(ii.) There has been less reluctance to create cases of quasi-crime in connection with the sale (by servants) of liquor to drunken persons.

In *Worth v. Brown* (r), where a barmaid was left in charge of licensed premises and suffered a drunken man to remain there, a charge against the licensee having been dismissed by the magistrate, the case was remitted to him with directions to convict, on the ground that the barmaid by being placed in charge of the bar, was for the purposes of the Act substituted for the licensee himself.

“She was not merely his agent for certain purposes only; she was his agent in the further sense of being his *alter ego*, and the licensee was liable for any misconduct of hers in the management of the business.”

(o) Under sect. 3 of the Licensing Act, 1872; now sect. 65 of the Consolidation Act, 1910.

(p) *Infra*.

(q) Per Lord Alverstone, C.J.

(r) 40 Sol. J. 515; 62 J. P. 658 (1896), under sect. 13 of the Licensing Act, 1872.

In *Commissioners of Police v. Cartman* (s) a police constable called the attention of a door porter to the fact that a man entering the respondent's public-house was drunk. The porter spoke to the barman, who nevertheless insisted on serving the drunken man with a glass of beer. The respondent was a considerable distance away, and out of sight of the bar, and had given precise instructions to the porter and the barman to refuse drink to drunken or half-drunken persons. It was held, upon a case stated, that the magistrate must convict, and Lord Russell of Killowen, C.J., said :—

“ It is true that sometimes the licensee keeps in his own hands the direct control over his own business ; but in the great majority of cases it is not so, the actual control being deputed to other persons ; are the licensees in these latter cases to be liable under this section for the acts of others ? In my opinion, they are, subject to this qualification, that the acts of the servant must be within the scope of his employment. . . . It makes no difference for the purposes of this section that the licensee has given private orders to his manager not to sell to drunken persons ; were it otherwise, the object of the section would be entirely defeated. . . . It is clear that there is no machinery by which the person actually selling can be convicted ; a penalty can only be inflicted on the licensee.

“ It is impossible for us to place upon the section the narrow construction suggested. In one sense the case is upon the confines of a criminal offence ; but, apart from authority, which is absolute, I think it was intended that the responsibility should be upon the licensee for acts done by an employee within the scope of his authority. The authorities chiefly relied on by the respondent (t) have, I think, no bearing on the case ; they relate to gaming, and it cannot be contended that a barman, as part of his implied authority, has power to sanction the carrying on of gaming on his master's premises.”

The quasi-criminal liability of licensees for their servants' acts, as established by these cases, remains unaltered by the Consolidation Act, and is in fact expressly recognised therein (u).

(iii.) In *Mullins v. Collins* (x) it was held that a licensed victualler whose servant without proper inquiry supplied liquor to a constable on

(s) 1896, 1 Q. B. 655.

(t) *Somerset v. Hart*, etc., *infra*.

(u) 10 Edw. 7 & 1 Geo. 5, c. 24, s. 75.

(x) L. R. 9 Q. B. 292 (1874).

duty, without the authority of the latter's superior officer, was liable to be convicted under sect. 16 of the Licensing Act, 1872 (y), although he had no knowledge whatever of the servant's act. It was, however, observed that, if the servant had honestly believed the constable to have authority from his superior officer, or if the servant had done the act clandestinely, the master would not have been liable (z).

(iv.) *Emary v. Nolloth* (a) was a case under sect. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901 (b), where liquor in an unsealed bottle was sold to a child by a servant of the licence-holder, contrary to his express orders and without his knowledge, he himself being in charge of the premises at the time of the sale. It was held that he could not be convicted under the section; and Lord Alverstone, C.J., after suggesting that the Act might be amended, said:—

“ We have now to consider whether, under the circumstances appearing in this case, a licence-holder who, on the one hand, neither knew of nor connived at the offence, and on the other hand had not delegated his authority to any other person, can be convicted of an offence against this statute. . . . If the offence is prohibited in itself, knowledge on the part of the licensee is immaterial; this principle was acted upon quite recently in *Brooks v. Mason* (c). Then comes the class of case in which the licensee is charged with knowingly allowing, permitting, or suffering an offence to be committed: in those cases knowledge is essential (d), but it has been held, and this is the second principle to be extracted from the decisions, that if the licensee delegated his authority to some one else, . . . the licensee is responsible for permitting it. . . . Then we have thirdly the class of case where, under the circumstances (as in the present case) there has been no delegation of authority (e), and the licensee is himself controlling the business, and has given direct instructions (f) to the persons in his employ that there is to be no infraction of the provisions of the statute.”

(v.) There have been numerous decisions in which rather fine

(y) Now re-enacted in almost identical words in 10 Edw. 7 & 1 Geo. 5, c. 24, s. 78.

(z) Per Quain, J.

(a) 1903, 2 K. B. 264.

(b) 1 Edw. 7, c. 27; now sect. 68 of the Consolidation Act, 1910.

(c) *Ante*, Chap. II.

(d) *Groom v. Grimes*, *ante*, Chap. II.

(e) *McKenna v. Harding*, 69 J. P. 354 (1905); *Allchorn v. Hopkins*, *ib.* 355 (1905).

(f) Cf. *Greig v. Macleod*, 1908, S. C. (J.) 14, where sufficient instructions were not given.

distinctions have been drawn, upon the construction of sect. 17 of the Act of 1872 (*g*), which punished by fine any licence-holder who suffered any gaming or unlawful game to be carried on upon his premises.

It was held in *Bosley v. Davies* (*h*), where a landlady was convicted of suffering cards to be played, but there was no evidence of knowledge on her part, that the case must go back to the justices with an intimation that, although actual knowledge on the part of the defendant or her servants need not be shown, in the sense of the seeing or knowing of the card-playing, yet some circumstances must be proved from which it could be inferred that they connived at what was going on. "A man may be said to suffer a thing to be done, if it is done through his negligence." (*i*).

In *Redgate v. Haynes* (*k*), the appellant was charged with suffering gaming to be carried on in her hotel at Epsom. There was some evidence tending to show that she or her porter, whom she had left in charge of the premises on retiring for the night, had purposely taken pains not to know what was going on; and it was held that such evidence justified the conviction, the appellant being responsible for the conduct of the porter so left in charge:—

"I agree that the mere fact that gaming was carried on on her premises would not render her liable to be convicted, for that is not *suffering* the gaming to be carried on; and if the justices were of a different opinion, they were wrong; but I think, if she purposely abstained from ascertaining whether gaming was going on or not, or in other words connived at it, that this would be enough to make her liable; and I think that where the landlady goes to bed she is still answerable for the conduct of those whom she leaves in charge of the house, and if those persons connive at the gaming, she is responsible" (*l*).

This case was followed in *Crabtree v. Hole* (*m*), where an alehouse keeper left a manager to attend to the conduct of business, and the manager went to bed, leaving "boots" to attend to the house. Boots, as deputy manager, wilfully shut his eyes and ears to the gaming which went on one night after closing hours. The justices were held to have

(*g*) Now re-enacted in practically the same form, 10 Edw. 7 & 1 Geo. 5, c. 24, s. 79.

(*h*) 1 Q. B. D. 84 (1875).

(*i*) Per Cockburn, C.J.

(*k*) 1 Q. B. D. 89 (1875).

(*l*) Per Blackburn, J.

(*m*) 43 J. P. 799 (1879).

rightly convicted the licensee. It was contended that the licensee could not be expected to sit up all night, but Cockburn, C.J., said :—

“ I cannot distinguish this case from *Redgate v. Haynes*. This case is on the confines between a civil and a criminal offence. The duty imposed by the enactment is to take reasonable care that gaming is not suffered on the licensed premises ; and if the licence-holder employ one who does not do his duty, it is the same as if he himself did not do the duty.”

In *Somerset v. Hart* (n), however, upon an appeal from acquittal where the gaming had taken place to the knowledge of a servant of the licence-holder employed on the premises, but not shown to have been in charge thereof, the justices were held rightly to have refused to convict, in the absence of any evidence of personal connivance or wilful blindness on the part of the licence-holder :—

“ I do not say that proof of actual knowledge on the part of the landlord is necessary . . . but where no actual knowledge is shown there must, as it seems to me, be something to show either that the gaming took place with the knowledge of some person clothed with the landlord's authority, or that there was something like connivance on his part ; that he might have known but purposely abstained from knowing ” (o).

In *Bond v. Evans* (p), where the gaming had taken place to the knowledge of a servant in charge of the licensed premises, but without the licensee's knowledge or connivance, a conviction was upheld by the Court, and Stephen, J., said :—

“ *Newman v. Jones* (q) was the only decision which made me hesitate at all in the present case ; because at first it seemed to me to have been held that there could not be a conviction because the steward had acted contrary to the orders of the appellants. But the trustees of a club are on a different footing from a licensed victualler, who is the proprietor of a house and the holder of a license. For these reasons I think that *Newman v. Jones* stands on its own circumstances, and is distinguishable from the present case.

“ In the present case I follow *Bosley v. Davies* and *Redgate v. Haynes*, and without differing from the decision in *Somerset v. Hart*, I have come to the conclusion that the conviction was right and ought to be affirmed.

(n) 12 Q. B. D. 360 (1884) ; followed in *Smith v. Slade*, 64 J. P. 712 (1900).

(o) Per Lord Coleridge, C.J.

(p) 21 Q. B. D. 249 (1888).

(q) *Supra*.

“I can see no distinction between the word *permits*, which is used in some of the other sections, and the word *suffers*, which occurs in section 17.”

It seems to have been suggested, in one or two cases, that cruelty to animals is another species of offence in respect of which a master ought to be made quasi-criminally liable for his servants' acts, where he has had no cognizance thereof or participation therein, and even where he may have done his best to prevent the occurrence of the conduct complained of.

It is believed, however, that this form of quasi-crime has been established in only one instance, and as the decision in that case was grounded on narrow and peculiar reasons, it cannot be relied upon as an authority for any general extension of the theory.

The Slaughter-Houses, etc. (Metropolis) Act, 1874 (*r*), contains in terms no prohibition as to the manner of slaughtering cattle, but empowers the local authority to make by-laws regulating the conduct of business, and certain by-laws made thereunder prohibited the occupier of a slaughter-house from slaughtering, or permitting to be slaughtered, any animal contrary to certain regulations therein laid down, one of which is to the effect that no animal shall be killed in the sight of another.

In *Collman v. Mills* (*s*) it was held that, upon a breach of this regulation, the occupier of a slaughter-house was liable for the act of his servant, although the offence by the servant was committed without the knowledge and contrary to the express orders of his master. The reasoning of the judgment by Wills, J., in this case seems rather inconclusive; but apparently the whole *ratio decidendi* was contained in the short judgment of Wright, J. :—

“It seems to me that local authorities are entitled in effect to say to any one applying to them for a licence, that a licence for slaughtering will be granted on certain terms by which the licensee must abide. One of these may be that he should be responsible for the acts of his servants.”

From this decision it may perhaps be deduced that the phenomenon of quasi-crime may be expected to occur wherever the Legislature places a particular kind of business under a restrictive system of licensing

(*r*) 37 & 38 Vict. c. 67, s. 4.

(*s*) 66 L. J. Q. B. 170 (1896).

by public authority, and where the licence-holders are placed under special statutory duties as to the conduct of such business, such duties being enforceable under penalties, and being of such a nature as to involve or obviously contemplate personal supervision or absolute responsibility on the part of each person entrusted with a licence.

That quasi-crime has no special connection with cruelty to animals in general seems to be established by the decision in *Small v. Warr* (t), where certain horses in a colliery were worked in a wounded condition. The appellant was summoned as part-owner and manager of the mine, but there was no evidence of any knowledge on his part of the state in which the horses were. His conviction by the justices was quashed, on the express ground that *mens rea* was a necessary ingredient of the offence (u).

So also in *Elliott v. Osborne* (x), where some cattle were sent by sea to the appellant, and the rope by which a bullock was tethered rubbed against its skin, the appellant was held to have been wrongfully convicted of cruelty, by neglecting to loosen the rope, because there was no evidence of knowledge or personal negligence on his part :—

“The appellant . . . had given directions to his foremen to examine all his cattle as soon as possible, and it seems that till Monday the state of this bullock was not examined. Can that be laches which is to be treated as an offence under the statute? There were no less than six hundred bullocks received in this cargo, and others came next day. Can it be said that it was the defendant's duty to go and see every bullock himself? Surely not; he has men to look after these details, and if one of the servants neglected the duty he might be proceeded against. . . . There must be some direct evidence of cruelty shown against a person to make it an offence. The neglect must be so strong and clear that the reasonable inference must be that the person aware of the bullock's condition neglected in some way to relieve it” (y).

On the other hand, it may be observed in passing (though it would seem to be obvious) that the allegation of “commercial expediency”

(t) 47 J. P. 20 (1882), under the Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), s. 2.

(u) Per Field, J.

(x) 56 J. P. 38 (1891); cf. *North Staffordshire Railway Co. v. Waters*, 78 J. P. 116 (1913), as to non-liability of railway company under the Diseases of Animals Act, 1894.

(y) Per Grantham, J.

is as immaterial, by way of excuse for crimes of cruelty to animals, as it would be in the case of any other class of offences (z).

Before the passing of Lord Campbell's Act in 1836 (a), it was settled law that the proprietor of a newspaper was criminally responsible for a libel inserted in his paper (b), and a bookseller or publisher was likewise responsible for a libel in any book which was sold or published by the persons acting under his authority, even though he himself did not know or authorise the insertion of any libel, and might not even have known of its existence (c).

"The proprietor of a newspaper which contained a personal libel was treated as a criminal, though he had not himself committed the criminal act, nor procured or incited another to commit it, nor aided in its commission, nor knew that it was about to be committed" (d).

This anomaly differed from other cases of quasi-criminal liability on the part of masters, inasmuch as a libel is a private injury, and affects the public only indirectly, or in a secondary sense. The reasons, therefore, of public welfare and necessity which may possibly justify the application of the principle of *respondeat superior* to criminal liability in such exceptional cases as those of nuisance, adulteration of food and the like, could hardly be alleged in support of the common law doctrine as to criminal libels; and, to cure the obvious hardship of that doctrine it was provided, by the statute above referred to, that—

"Whosoever upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent or knowledge, and that the said publication did not arise from want of due care or caution on his part."

(z) *Waters v. Braithwaite*, 78 J. P. 124 (1913), where a cow was driven to market overstocked, to show that it was in milk.

(a) 6 & 7 Vict. c. 96, s. 7.

(b) *R. v. Walter*, 3 Esp. 21 (1799); *R. v. Gutch and Others*, M. & M. 433 (1829); et vide *R. v. Cooper*, 8 Q. B. 533; 10 J. P. 631 (1846).

(c) *R. v. Nutt*, 1 Barn. K. B. 306 (1728); *R. v. Dodd*, 2 Sess. Cas. 33 (1736); *R. v. Almon*, 5 Bur. 2686; Ken. S. C. 35 (1770); *Colburn v. Patmore*, 1 C. M. & R. 73, per Alderson, B., at p. 76 (1834).

(d) Per Lush, J., *R. v. Holbrook*, 4 Q. B. D. 42, 49 (1878).

In *R. v. Holbrook and Others* (e) the meaning of this statute was held to be—

“That the proprietor of a newspaper, or the proprietor of a book-seller’s business, whose authorised agent inserts in the paper, or sells over the counter in a book, some libellous matter without his knowledge, shall not be made criminally responsible if he is able to show that the libellous matter was published ‘without his authority, consent or knowledge,’ and that it ‘did not arise from want of due care or caution on his part’ ” (f).

Or, in other words :—

“Before the Act, the only question of fact was whether the defendant authorised the publication of the paper ; now, it is whether he authorised the publication of the libel ” (g).

But, the authority need not be a special authority to publish that particular libel which is complained of :—

“I have no hesitation in saying that, where a general authority is given to an editor to publish libellous matter at his discretion, it will avail a proprietor nothing to show that he had not authorised the publication of the libel complained of. It is equally clear that though in the authority originally given to the editor no licence to publish libellous matter may have been contained, still, such an authority may be inferred from the conduct of the parties, as, for instance, from the fact that other libels have been published in the paper, which have come to the knowledge of the proprietor, and without his remonstrance or interference, or the removal of the editor, from which the assent of the proprietor might well be inferred. . . .

“Protection is further afforded to individuals and the public by the immunity afforded by the statute being conditioned on the exercise of due care and caution on the part of the proprietor. Many circumstances might be held by a jury to amount to the absence of the care and caution thus required. The employment of an incompetent or untrustworthy editor, or one who had before been proceeded against for libel ; total omission ever to look at the paper to see in what manner it was conducted, or, as in this very case, the omission, though taking part in the publication of the paper, to insist on having articles of a doubtful

(e) 3 Q. B. D. 60 (1877), and 4 Q. B. D. 42 (1878) ; et vide *R. v. Bradlaugh and Others*, 15 Cox, 217 (1883) ; *R. v. Ramsey and Foote*, ib. 231 (1883) ; *R. v. Allison and Others*, 16 id. 559 ; 53 J. P. 215 (1888).

(f) Per Lush, J., *R. v. Holbrook and Others*, 3 Q. B. D. at p. 7

(g) Per Lush, J., 4 Q. B. D. at p. 50.

tendency submitted for approval, might be deemed by a jury sufficient to disentitle a proprietor to the protection of the statute" (*h*).

In *Ex parte Parry* (*i*) a rule against the proprietors and publishers of *Reynolds's Newspaper* for criminal information for libel was discharged by consent, on proof that the libel was inserted in the paper by inadvertence during the absence of the editor.

In addition to the foregoing classes of quasi-crime, there are to be found in the reports a few isolated instances in which the maxim *respondet superior* has been exceptionally applied to criminal offences, in a more or less arbitrary manner.

For example, under a repealed Excise Act (*k*) a master was held liable to penalties in respect of the concealment of smuggled goods by his servant although the act was committed in his absence and without his knowledge (*l*). The judgment proceeded on the ground that "whatever a servant does in the course of the employment with which he is entrusted, and as part of it, is the master's act. The legal presumption is so, unless the contrary be shown" (*m*). But it was at the same time acknowledged that this was not a principle of general application in criminal law; and it was stated to be applicable in that case only because the proceedings were in the nature of "a mere civil proceeding for a penalty, which is a debt due to the Crown" (*n*) and "not properly a criminal proceeding" (*o*).

So, also, it was held in *Attorney-General v. Burges* (*p*), upon an information under an old statute of Anne, for treble value of "run" goods, that any one of several persons concerned in the goods, whether by way of partnership or otherwise, was liable for the full penalty, in the same way as a tortfeasor; and—

"That on such an information, there was no necessity that the goods should be proved to have come actually into his hands if they came into

(*h*) Per Cockburn, C.J., 4 Q. B. D. 61-2.

(*i*) 41 J. P. 85 (1877); cf. *R. v. Barnard*, 43 J. P. 127 (1879).

(*k*) 57 Geo. 3, c. 123, s. 13; repealed by Statute Law Revision Act, 1861.

(*l*) *A.-G. v. Siddon and Another*, 1 Tyr. 41 (1830); et vide *A.-G. v. Riddell*, 2 C. & J. 493 (1832); *A.-G. v. Allen*, Highm. 38 (1850); *Adv.-Gen. v. Grant*, 15 Sc. Sess. Cas. 980 (1853).

(*m*) Per Alexander, C.B.

(*n*) Per Alexander, C.B., at p. 49.

(*o*) Per Bayley, B., ib.; per Vaughan, B., at p. 52.

(*p*) Bunb. 223 (1726); cf. *A.-G. v. Stannforth and Others*, ib. 97 (1721); *Mitchell v. Torup*, Parker, 227 (1766).

his power, or into the custody of any agent of his, or to any person by his direction."

Davies v. Harvey (q) arose upon the construction of a statute (r) prohibiting, under a penalty of £5, certain public officers from supplying for their own profit or on their own account any goods ordered to be given in parochial relief. The appellant was a guardian, and also a cabinet-maker. His son, who was a partner in his business, without the appellant's knowledge supplied a bedstead intended to be given in parochial relief. It was held, upon a case stated, that the appellant was liable to conviction, although he had no knowledge that the article was intended to be so given :—

"If this section made the supplying of goods a crime, I should say it required something more than that the goods had been supplied under a general authority given to a partner, to make a co-partner liable for a crime ; but when we look at the object of the section and its language I think it forbids the supplying of goods by a guardian for his own profit and on his own account ; whether that be done through the agency of a partner, or a manager, or a servant, the mischief certainly is the same. I agree that, in order to make the supply of goods an offence, it must be shown that the partner or manager entrusted with authority by the co-partner or master was aware that he was dealing in the supply of goods given in parochial relief. I think it is necessary that knowledge should in that sense be brought home to a guardian ; I do not think it is necessary to show that he had personal knowledge ; it is sufficient to constitute the offence if the partner or manager who supplied the goods had knowledge " (s).

"The section does not make the supplying of goods a crime, but prohibits it by a penalty. . . . Were it otherwise, it would make a very wide way for evasions " (t).

Some modern statutes contain express provisions, not only imputing to a man knowledge of certain material facts in relation to his own conduct, but rendering him answerable, within prescribed limits and in default of rebutting evidence, for the conduct of his servants and other persons acting on his behalf.

(q) L. R. 9 Q. B. 433 (1874).

(r) 4 & 5 Will. 4, c. 76, s. 77.

(s) Per Blackburn, J.

(t) Per Lush, J.

The peculiar provisions inserted in the Betting and Loans (Infants) Act, 1892 (*u*), have already been noticed (*x*).

By the Truck Amendment Act, 1887 (*y*), it was provided, *inter alia*, as follows :—

“(1) Where an offence for which an employer is, by virtue of the principal Act (*z*) or this Act, liable to a penalty has in fact been committed by some agent of the employer or other person, such agent or other person shall be liable to the same penalty as if he were the employer.

“(2) Where an employer is charged with an offence against the principal Act or this Act, he shall be entitled, upon information duly laid by him, to have any other person whom he charges as the actual offender brought before the Court at the time appointed for hearing the charge, and if, after the commission of the offence has been proved, the employer proves to the satisfaction of the Court that he has used due diligence to enforce the execution of the said Acts, and that the said other person had committed the offence in question without his knowledge, consent or connivance, the said other person shall be summarily convicted of such offence, and the employer shall be exempt from any penalty.”

Precisely similar provisions are contained in the Factories and Workshops Act, 1901 (*a*), and the Shops Act, 1912 (*b*), with reference to the statutory offences thereby created respectively.

In a recent and important case which has been referred to in a previous chapter (*c*), a motor cab company was charged with aiding and abetting a driver in committing an offence under the Motor Car Acts, 1896 and 1903. At the hearing of the summons, it was found that the man was driving one of the appellants' motor cabs more than an hour after sunset, without having the identification plate at the back of the cab illuminated; that the lamp was hanging too low, and was showing a light beneath the plate; that a proper bracket was provided on which to hang the lamp; and that it was the duty of the appellants' foreman to see that the cabs went out all right. The appellants contended that

(*u*) 55 & 56 Vict. c. 4, ss. 1 (2) and 2 (2).

(*x*) *Ante*, Chap. II.

(*y*) 50 & 51 Vict. c. 46, s. 12.

(*z*) Truck Act, 1831 (1 & 2 Will. 4, c. 37).

(*a*) 1 Edw. 7, c. 22, ss. 140—141.

(*b*) 2 Geo. 5, c. 3, s. 14 (2), (3); vide *Ward v. W. H. Smith & Son*, 1913, 3 K. B. 154; *George v. James*, 83 L. J. K. B. 303 (1914).

(*c*) *Ante*, Chap. II.

the driver must have taken the lamp from another cab, but of this there was no evidence. The magistrate convicted the appellants, on the ground that there was carelessness on their part in not seeing that a proper lamp was fixed on the cab. It was held on appeal that there was ample evidence from which to conclude that the cab was sent out by persons for whom the appellants were responsible in a condition which did not comply with the law (d) :—

“Article 11 of the Motor Car (Registration and Licensing) Order, 1903, made under the Motor Car Acts, 1896 and 1903, was made for the protection of the public. A breach of that regulation is not to be regarded as a criminal offence in the full sense of the word ; that is to say, there may be a breach of the regulation without a criminal intent or *mens rea*. . . . I think it right to say that if a corporation have a large number of cars and act, as they must act, by agents, and those agents send out the cars in a way which does not comply with the regulations, in my judgment the corporation are responsible for the penalties imposed thereby. The doctrine that there must be a criminal intent *does not apply to criminal offences of that particular class which arise only from the breach of a statutory regulation*. In my judgment, therefore, there was evidence upon which the learned magistrate could come to the conclusion that this car was sent out by persons, for whom the company was responsible, in a condition which did not conform with the statutory regulation ; and, that being so, there was evidence of the company aiding and abetting the offence” (e).

The passage italicised may perhaps be considered to be of more sweeping effect than the decision of the case required.

(4) *Hypnotism.*

A form of excuse, which has never yet been, but conceivably may be, raised by way of defence in an English Court of justice, is that the act charged has been committed under the complete influence or control of hypnotic or post-hypnotic suggestion.

Hypnotism, at first associated exclusively with the pretensions of the charlatan, is now systematically employed with more or less certainty of result by practitioners of the highest professional standing, not only

(d) *Provincial Motor Cab Co. v. Dunning*, 1909, 2 K. B. 599 ; cf. *Strutt v. Clift*, 1911, 1 K. B. 1 ; contrast *Phelon and Moore v. Keel*, 78 J. P. 247 (1914), as to “joy rides.”

(e) Per Lord Alverstone, C.J.

for the correction of vicious habits and suppression of hysterical tendencies, but in the cure of many bodily ailments which might at first sight seem wholly beyond the range of such an influence. The extraordinary nature of the manifestations produced by its agency entitles it to the closest attention of anybody interested in the operation of law and morality upon conduct.

Any person consenting to be hypnotised may, as a rule with little if any difficulty, be reduced to a condition the appearances of which resemble those of ordinary sleep ; and, whilst in that state, or in a more advanced state closely resembling somnambulism, which can in many cases be induced without difficulty, may often be subjected to the suspension of everything that normally constitutes personal independence, whether of judgment or of volition. Not only his choice of action, but even the operation of his senses, may be, at least to all appearances, placed at the disposal or under the influence of the hypnotist ; and the patient may, at any rate under favourable conditions, be easily impelled to perform acts of which in a normal state he would be morally, physically or intellectually incapable.

Not only so, but the influence may be so exercised as to control the subject's conduct and intelligence after what appears to be a complete restoration to the normal condition ; and a particular thought or wish may be "suggested" in such a manner that, after a considerable interval of time, it will almost infallibly be accepted and acted upon by the subject, at a given moment, without his even knowing or suspecting that it has been imposed upon him by suggestion, or artificially inculcated.

These facts, marvellous as they may seem, are attested by the careful observations of eminent scientists ; and they are therefore facts which, sooner or later, will have to be faced by those whose duty it is to adjudge responsibility for human conduct.

Although there is frequently some amount of difficulty in impressing hypnotic suggestions upon a fresh subject, or novice, and it appears to be admittedly impossible to do so in an ordinary case without the subject's consent, it seems clear that if such consent be repeatedly given even a healthy and normal subject will acquire a habit of suggestibility, or lose his power of resistance, so that the operator will be enabled to exercise hypnotic influence over him, upon any suitable opportunity

occurring, not only with facility, but in a remarkably short space of time.

It has even been asserted that a susceptible patient may be placed in the necessary condition of suggestibility, impressed with an hallucination or an impulse, and awakened, all within the space of fifteen seconds (f).

"The hypnotic subject may become the instrument of a terrible crime; the more terrible since, immediately after the act is accomplished, all may be forgotten—the crime, the impulse, and its instigator.

"Some of the more dangerous characteristics of these suggested acts should be noted. These impulses may give rise to crimes or offences of which the nature is infinitely varied, but which retain the almost constant character of a conscious, irresistible impulse; that is, although the subject is quite himself, and conscious of his identity, he cannot resist the force which impels him to perform an act which he would under other circumstances condemn. Hurried on by this irresistible force, the subject feels none of the doubts and hesitations of a criminal who acts spontaneously; he behaves with a tranquillity and security which would in such a case ensure the success of his crime" (g).

The School of the Salpêtrière and La Charité (Paris) was in the forefront of modern hypnotic research; and its members perhaps naturally entertained extreme views as to the results which might be obtained by their *modus operandi*. They appear to have generalised somewhat too freely from experiments and observations which were of limited range, their patients being invariably of hysterical disposition, or "weak minded."

The views above expressed as to the possibility of actual crime must therefore be accepted with reservation; indeed, it has been asserted by an eminent authority that the theories of the Salpêtrière "are now almost universally discredited by those practically engaged in hypnotic work" (h)—a remark which would probably apply to the view still held by Dr. Pierre Janet to the effect that hypnotism is no more or less than a form of hysterical somnambulism (i). The statement that eighty (k) or even ninety (l) out of every hundred of the recorded

(f) Binet and Féré, pp. 364-5.

(g) *Ib.*, pp. 372-3.

(h) Bramwell, p. 296.

(i) Janet, p. 114.

(k) Bramwell, p. 297.

(l) Enc. Br., art. "Hypnotism."

attempts by experienced operators to hypnotise patients, of all dispositions and classes, prove successful, seems to dispose of any idea that the influence is confined to abnormally hysterical subjects; though there can be no doubt that hysteria is characterised by a high degree of suggestibility (*m*).

Whatever may be thought of the speculations put forward by the investigators of the Salpêtrière, there is not much to be gained by denying the happening of the occurrences which they have described, for these are equalled, if not surpassed, by the results of numerous experiments performed during the last twenty or thirty years by savants of other schools, whose integrity cannot be doubted, whose scientific training and qualifications cannot fail to attach the highest value to their methods and discoveries, and the unanimity of whose statements as to facts observed is the more remarkable when contrasted with the acute differences between them as to the nature of the force which they invoke, and the explanation of the manifestations which they succeed in producing.

By way of illustration, it will perhaps suffice to quote one or two lucid statements and forcible examples from the writings of Professor Bernheim, of the Nancy "School":—

"Si je dis à un sujet endormi: 'Au réveil, vous aurez un accès de rire, ou une crise de larmes,' ces faits peuvent se réaliser chez lui. Si je dis: 'Après votre réveil, vous trouverez un verre de champagne fictif sur la table, et vous le boirez,' au réveil l'hallucination pourra avoir lieu. Si je dis: 'A votre réveil, vous irez voler une montre sur la cheminée,' il pourra commettre cette acte, cronyat la faire spontanément. Je puis lui donner des hallucinations complexes. . . . Mais cette suggestion post-hypnotique peut être faite *pour une échéance plus ou moins lointaine*. Au réveil le sujet ne se souvient de rien. Il peut rester des jours et des semaines en apparence complètement ignorant de la suggestion faite; au jour et à l'heure voulue, elle se réveille dans son esprit et se réalise. Citons quelques exemples: A une jeune fille parente, très intelligente et instruite, qui était dans ma famille, très suggestible, que j'endormis un matin sur sa demande pour lui enlever un malaise nerveux, je dis pendant son sommeil: 'Ce soir après le dîner, vous irez au piano, vous nous jouerez quelques morceaux et vous terminerez par la valse de *Faust*.' Le soir en effet, pendant qu'on était au salon, après le dîner, elle dit: 'Je vais jouer un peu de piano.' Elle s'y dirige, allume les bougies, joue des classiques, puis tout d'un

(*m*) *Ib.*, art. "Suggestion."

coup entonne la valse de *Faust*. Revenue à sa place, je lui demande : ' Pourquoi avez-vous joué cette valse ? Aviez-vous l'idée préméditée de le faire ? ' Elle dit : ' Non, je n'y pensais pas, cela m'est venue tout d'un coup. Je ne sais pas ce qui m'a pris de jouer la valse de *Faust* ; je ne la joue jamais. ' Elle fut bien étonnée quand je lui ai dit que c'était une suggestion. . . .

" Dans une de mes expériences, la suggestion a été faite pour une échéance de 63 jours.

" Tous les sujets ne réalisent pas ces suggestions lointaines. Quelques-uns les réalisent seulement quand on les met sur la voie, quand on actionne l'imagination qui couve, pour ainsi dire, le souvenir, mais qui ne l'aurait pas laissé éclore spontanément. Ainsi en est-il de tous les souvenirs qui ont souvent besoin pour se faire jour d'une suggestion provocatrice. Voici une de mes expériences : j'avais suggéré à un de mes patients que dans cinq jours, quand je le ferais venir à la salle des conférences, il y verrait un sergent de son ancien regiment, que ce sergent l'accuserait de lui avoir volé sa montre, qu'ils se battraient et que lui serait renversé.

" Au bout de cinq jours, je le fais venir à la salle des conférences. Je le fais assoir et je continue ma conférence devant les élèves ; il est un peu interloqué par la présence de tant de monde ; l'hallucination suggérée ne se manifeste pas. Après plusieurs minutes, j'essaie de la provoquer : ' Qu'est-ce que vous regardez donc là ? ' dis-je, — ' Ah, répond-il, c'est un sergent de mon regiment. Il prétend que je lui ai volé sa montre. Je n'ai rien volé. ' Il se lève, donne des coups de poing dans le vide, et tout d'un coup tombe, comme assommé. Il faut que je l'aide à se relever. Il ne voit plus le sergent qui est parti " (n).

Here we have two striking instances of complex suggestions impressed upon normal persons while under hypnotic influence, the one consisting of an unusual impulse ; the other of an hallucination impelling to violent action ; both punctually and unhesitatingly obeyed after a considerable lapse of time, in an apparently independent and sincere manner.

The possibility of such performances being admitted, however much skill or tact may be required for their arrangement, there seems to arise a serious question as to the fixing of responsibility for the conduct of the subject under the hypnotic, or rather post-hypnotic, suggestion.

To the possibility of a criminal use being made of hypnotic suggestion, it has been objected that there is a residuum of independent personality, or subjective consciousness in the patient, which would usually be sufficient to guard him from the apparent danger of his situation,

(n) Bernheim, Chap. 8, s. 6 ; et vide Chap. 10, s. 1.

notwithstanding the suspension of his objective consciousness, or that "common sense" which usually controls or regulates his impulses.

Personality, prejudice, character, strength of mind, habits of thought and action—all these and many other factors in the individuality of a man are so many lines of defence against the arts of the hypnotist; and though of varying importance with different persons and in different circumstances, they frequently form serious, and sometimes insuperable, obstacles to success in the conveying of a suggestion, or the securing of its due and exact performance.

"Expressions of the will which spring from the individual character of the patient are of the deepest psychological interest. The more an action is repulsive to his disposition, the stronger is his resistance. Habit and education play a large part here; it is generally very difficult to suggest anything that is opposed to the confirmed habits of the subject. For instance, suggestions are made with success to a devout Catholic; but directly the suggestion conflicts with his creed, it will not be accepted. The surroundings play a part also. A subject will frequently decline a suggestion that will make him appear ridiculous. . . .

"Exactly the same resistance is sometimes offered to a post-hypnotic suggestion. It is possible in such a case that the subject, even in the hypnotic state, will decline to accept the suggestion. Many carry out only the suggestions to which they have assented.

"Pitris relates an interesting case of a girl who would not allow him to awake her, because he had suggested that on waking her she would not be able to speak. She positively declared that she would not wake until he gave up his suggestion. But even when the suggestion is accepted as such, a decided resistance is often expressed during its post-hypnotic execution. This shows itself as often in slow and lingering movements as in a decided refusal to perform the act at all. The more repugnant the acting, the more likely is it to be omitted" (o).

According to one view of such cases (*nam quot homines, tot sententiæ*), the suggestion from outside is met, and may be overridden or vanquished, by an auto-suggestion from within the citadel of a man's personality:—

"Now, what is an auto-suggestion? In its broad significance it embraces not only the assertions of the objective mind of an individual, addressed to his own subjective mind, but also the habits of thought of the individual, and the settled principles and convictions of his whole life; and the more deeply rooted are those habits of thought, principles and convictions, the stronger and more potent are the auto-suggestions,

(o) Moll, p. 171; et vide p. 337.

and the more difficult they are to overcome by the contrary suggestions of another. It is in fact impossible for a hypnotist to impress a suggestion so strongly upon a subject as to cause him actually to perform an act in violation to the settled principles of his life. . . . The strongest suggestion must prevail.

"It will thus be seen that the question as to whether hypnotism can be successfully employed for criminal purposes must be determined in each individual case by the character of the persons engaged in the experiment. . . .

"The auto-suggestion most difficult to overcome is that which originates in the normal action of the subjective mind—otherwise, instinctive auto-suggestion. . . .

"We will suppose the most favourable condition possible for procuring the commission of a capital crime; namely, a criminal hypnotist in control of a criminal subject. The disposition of the subject might not stand in the way; there might be no auto-suggestion against the commission of crime in the habits and principles of the life of the subject; and yet the instinct of self-preservation would have its weight and influence in suggesting to him that the commission of a murder would imperil his own life. Such a consideration would operate as potently in the hypnotic condition as it would in the normal state. It would be an instinctive auto-suggestion, just as in the case of suicide, although it would operate indirectly in one case, and directly in the other. The deductive reasoning of the subjective mind . . . is perfect; and in the case supposed, the subject would instantaneously reason from the proposed crime to its consequences to himself. The same law would operate in preventing the commission of crimes of less magnitude, with a resistance decreased in proportion to the nature of the offence. But it would, in all cases, be a factor of great importance in the prevention of crime; for the subjective mind is ever alert where the safety and well-being of the individual are concerned" (p).

There appears to be a great deal of force in these arguments, and the more for their moderation. The important point, for the present purpose, is the uncertainty of their application.

If we revert for a moment to Professor Bernheim's example of assault and battery upon an invisible and non-existent opponent, we can realise how completely difficulties of the kind suggested might be met by the skilled inculcation of a false idea or hallucination. We may assume that the subject in that case was of a pugnacious disposition, but he certainly cannot have been a man of criminal instincts or felonious habits; or

he would hardly have resented so violently an imaginary accusation of petty larceny.

If an assault and battery on an imaginary individual can be so easily arranged and brought to an issue, there would seem even less difficulty in inducing a real act of violence, by the instilling of a simpler and more plausible hallucination, relative to an actual person, who would be made the victim of a more effective onslaught.

"No doubt there is force in the staple criticism . . . that it is one thing to induce subjects to commit imaginary, and another thing to induce them to commit real, crimes. But on the other hand, this criticism postulates subjects, who are normally under the government of moral principle; and it is difficult to deny the possibility of criminal suggestions being made to persons who are not ordinarily controlled by the moral sanction at all" (g).

Whatever differences exist among hypnotists as to the solution of the problems created by their efforts, there seems to be a consensus of opinion in favour of the possibility (to put it no higher) of their art being abused, by a skilful and unscrupulous practitioner, for the purpose of impressing upon an impressionable patient the suggestion of a criminal act, and securing its performance by him, either during the continuance of the hypnotic condition, or afterwards, and either with or without the aid of an accompanying hallucination, or false intellectual idea.

So much, at any rate, is admitted by Dr. C. L. Tuckey, who makes the following cogent remarks on the subject :—

"Hypnotism acts chiefly, as we have seen, by immensely increasing the capacity for receiving, and the desire to act upon, suggestion. It is this property which we make use of in dealing with drunkards and morphinomaniacs, and our suggestions of abstinence and self-control are received and acted upon in proportion to the depth of sleep attained and the natural receptivity of the patient. I have, however, seen suggestion curative in a case of chronic drunkenness where the influence of hypnotism was barely discoverable, and I have seen it fail where somnambulism was induced. In the first case the patient's desire was for cure, and the natural force of moral suggestions had to be but slightly increased in order to obtain success, whereas in the latter instance, the patient had no real desire to give up his bad habit, and the suggestions found no soil in which to take root. I see no reason for supposing that a somewhat similar result would not follow criminal suggestions. It would be

vain to make criminal suggestions to the disciplined and moral man, for he would either wake up at once or would ignore them ; but it would be an easy task to corrupt the naturally weak and ill-disposed. If . . . one told a sincere teetotaler that on waking he was to drink a glass of brandy, it is certain that the suggestion would fail, no matter what was the degree of sleep induced ; but the half-hearted abstainer might perhaps succumb, just as he would yield to the pertinacious solicitation of his ordinary companions, because the wish to abstain was not strongly grounded or an essential part of his individuality. . . .

"It is my opinion, and also my experience, that the power in us for good is more potent than that for evil, and that it would be very much harder to make the good man do wrong than to influence the bad man for good. But hypnotism acts by increasing the normal impressionability to suggestion ; and as a moral person of unstable character may be corrupted in time by vicious surroundings and evil influences, so, I believe, the same person could be more quickly and surely corrupted by evil suggestions made to him while in the hypnotic state. I have no doubt that many of the subjects taken about with them by travelling showmen have entirely lost all individuality, and have become passive instruments in the hands of their employers. To reduce a fellow-creature to such a condition is, I hold, one of the greatest offences which can be committed against the dignity of humanity. . . .

"The experiments of Professor Pierre Janet, of Havre, and Professor Liegeois, of Nancy, seem to show that under special circumstances and in rare instances a subject who has been hypnotised a great number of times by the same operator may be sent to sleep by the hypnotist exerting his will from a distance. I have come to this conclusion with extreme unwillingness, for it seems to open up the possibility of a man or woman being reduced to a state of complete mental and moral slavery" (r).

The same verdict has been no less freely and clearly pronounced by other authorities on the subject :—

"Suggestion in waking condition possesses a medico-forensic importance which has hitherto not been realised to its full extent. For—

"(a) It is capable of causing persons who are mentally perfectly normal, to give false *bonâ fide* sworn evidence. . . .

"(b) It can impel persons who are especially susceptible to suggestive influence to commit criminal acts. . . .

"Generally speaking, criminal suggestions are not dangerous for normal individuals with well-developed moral resistance ; but, on the other hand, the following fall an easy prey to it : childish, psycho-pathically

inferior, hysterical, psychically weak, ethically defective individuals, in whom the possibility of resistance is diminished by a feeble cultivation of the moral balance" (s).

The answer to the question of responsibility for acts committed under imperative hypnotic or post-hypnotic suggestion does not appear to depend upon the theory which may eventually be generally accepted as to the source and explanation of the manifestations in question.

Whether one concurs with Myers in ascribing these phenomena to the separate activity of a "sub-conscious or subliminal self," or whether one accepts the less startling and more fashionable view that consciousness is single and indivisible, and that hypnotic suggestions differ only in their mode of operation and not in their nature from all other suggestions, there seems no escape from the outstanding fact that the phenomena in question may place in the hands of one person an abnormal power or artificial influence over the intelligence and desires of another. The person subjected to that power or influence is no longer able to regulate his conduct in a normal manner according to his own desires, but is in effect liable to coercion, and perhaps even to compulsion for the time being, in respect of conduct suggested or dictated to him, at the desire of the hypnotist.

It is no doubt important that the phenomenon of self-hypnotism or deliberate auto-suggestion should be borne in mind :—

"Subjects can be taught to hypnotise themselves, and can then induce the state and its phenomena at will. In such cases it is absolutely impossible that the phenomena can be due to the suspension of the subject's volition, or to the operator's supposed power of controlling him" (t).

The fact is established beyond doubt; but it seems rather to point to a division or separability of consciousness than to justify any doubt as to the reality of the control apparently exercised by a hypnotist over his patient's conduct.

Perhaps the best way to consider the question is to compare the possible excuse of suggestion with the various other excuses which have already been admitted by our law as sufficient defences to a criminal

(s) Forel, p. 348; cf. Grasset, pp. 352-5.

(t) Bramwell, p. 437.

charge. With one or more of these, if entitled to any recognition at all, it must either be identified or at least be shown to have a close affinity.

In the first place, hypnotic influence may be alleged to have deprived the subject of *mens rea* by inducing an artificial state of ignorance, affecting his comprehension either of material facts or of the unlawful character of his conduct.

In either case his plight might be compared with that of an insane person, and if it could be satisfactorily established that he was incapable of thinking for himself, he might seem to establish his claim to an immunity which could hardly fail to be dangerous, and highly objectionable from the public point of view.

On the other hand, the condition of such a person would seem more properly comparable to that of a drunken person, who has only himself to blame for the consequences of his intemperance, than with that of a lunatic, whose deprivation of his faculties occurs through no fault of his own.

It might, however, be urged that the case of a person subject to hypnotic influence affecting his knowledge of facts, or appreciation of the law as applied to real or suggested facts, resembles neither the plight of a lunatic nor that of a drunkard, but ought to be considered in the same light as that of a person, normally capable of responsible conduct, acting *bonâ fide* under a temporary or accidental mistake, entertained on reasonable grounds.

The answer to such an argument must be that, as has already been repeatedly pointed out (*u*), there is no separate or independent principle under which *ignorantia facti* can of itself afford an excuse for crime; the excuse arising in cases of ignorance or mistake is merely a particular form, or application, of the principle of intentionality. The real ground of excuse in all such cases is that a person does not commit a crime who, after due attention and diligence, is unable to range the material facts or circumstances under the law applicable thereto.

It is an essential condition of raising any such excuse that the person whose conduct is in question shall have acted with due diligence, not only at the time of the alleged offence, but previously also.

A person who, with more or less deliberation, puts into the keeping of a hypnotist or any other person the control of those faculties without

(*u*) *Ante*, Chap. II.

which he can form no independent judgment, acts with less diligence, and is more obviously answerable for the consequences of his folly, than a person who, through natural gullibility or lack of education, too readily entertains the false assertions and suggestions of an inciter to crime, while still retaining the use of such faculties as nature has entrusted to him.

These considerations would seem to rule out the narrower excuse of hypnotic hallucinations, as distinct from, or independent of, the possible excuse of hypnotic "compulsion," or artificial control of conduct.

A similar reasoning would seem to apply to the other form in which the plea of hypnotic or post-hypnotic suggestion might be urged: viz., that the unlawful act or omission was attributable, not to the wish or desire of the subject under hypnotic influence, but to that of the person exercising such an influence over his conduct.

Here, however, the analogies to voluntary drunkenness, and to the conditions under which mistake or ignorance of fact may be pleaded are more remote. The principle which it would be necessary to invoke would be, not that of absence of intentionality, but that of compulsion, or absence of volition.

On the other hand, there is a close and striking analogy between the conduct of persons acting under suggestion (particularly post-hypnotic suggestion, which is probably the most dangerous in connection with any conduct involving complex or methodical action) and that of persons acting under a so-called "irresistible impulse" or "moral insanity," of the natural and spontaneous order.

It has indeed been asserted that "in hypnotic, and especially in post-hypnotic, suggestion we hold the key to all forms of conceptual and impulsive insanity"; and that the result of experiments is to show that in the post-hypnotic condition "the suggested ideas buried in the depths of the subconsciousness frequently rise to the surface of the subject's active life, and are realised with all the vehemence and fatality of an irresistible insane impulse" (x).

This statement, which may probably be accepted as describing with sufficient accuracy the extreme limits of the power of post-hypnotic suggestion over conduct, in the most favourable conditions possible, merely leads to the conclusion that the plea of suggestion, stated at its

(x) Sidis, p. 272

highest, could be admitted to validity under any system of law only by identification with, or inclusion under, the vague principle (hitherto consistently rejected by our Courts) of excuse by reason of "irresistible impulse," or lack of self-control.

It is unnecessary to recapitulate what has already been said as to the futility of the arguments in favour of the plea of "irresistible impulse." For practical purposes, no better illustration could be selected than that of an impulse impressed on a subject by means of hypnotic suggestion. The artificial character of such an impulse enables its strength or weakness to be, if not measured, at least studied and assessed in a manner that would be impossible in the case of any purely natural or spontaneous impulse. The origin of a hypnotic impulse, the processes of its operation upon the subject's mind and in his conduct, the success or failure of its issue in the appropriate result, and the reasons for such success or failure, are not matters of conjecture; they are all, from first to last, laid open to examination and analysis by the investigator.

The almost unanimous verdict pronounced by hypnotists is that, even in the most favourable circumstances, there can be no certainty of result; and the chief factor to which uncertainty is attributable is the moral character of the subject. His individuality, his natural or acquired prejudices, whether in favour of or against the act suggested, his moral tone and bias, and the weakness or strength of his character are all-important in the determination of the subject's suggestibility or resistibility to hypnotic influence.

So candidly do the modern hypnotists admit the incompleteness of their ascendancy over the conduct of their subjects, that they have changed the very names and phrases by which the nature of their art is described; and what used to be called animal magnetism, or mesmeric force, is now recognised as nothing more or less than a species of suggestion, differing only in method from all other forms of moral influence or persuasion.

We have considered *seriatim* the various cases in which the principle of absence of volition has been recognised by the law of England. In each case it has been seen that, to form a valid plea, there must be compulsion in the strictest sense of the word. There must be such a domination that no room is left (so far as the defendant is concerned) for wish or desire of any kind, as determining the conduct complained of. If there be any room for choice of action, the influence ceases to

amount to compulsion, and becomes mere duress or coercion, which affords no excuse whatever under our law, except in two anomalous cases (*y*) to which the case of hypnotic suggestion bears not the slightest resemblance or analogy.

In short, if, as appears to be admitted by all modern authorities, the operation of hypnotic or post-hypnotic suggestion lies merely in the impression upon the subject's mind of an imperative or urgent *desire*, resulting in the commission of the suggested conduct, it can give rise to no excuse under the principle of compulsion or absence of volition, which requires that the conduct shall be proved not to have depended upon the defendant's desire at all.

(*y*) *Post*, Chap. XI.

CHAPTER XI.

COERCION.

THE third principle of excuse propounded by Austin is that—

“Generally, an act or omission is not a crime, or is more or less excusable, if it proceeded from an instant and well-grounded fear stronger than the fear naturally inspired by the law” (a).

It will at once be noticed that this principle is stated in vague and uncertain terms. The same remark applies to Stephen’s definition of the supposed excuse of necessity :—

“An act which would otherwise be a crime may in some cases be excused if the person accused can show that it was done in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil ; that no more was done than was reasonably necessary for that purpose ; and that the evil inflicted by it was not disproportionate to the evil avoided. *The extent of this principle is unascertained.*” (b).

Neither of the two principles framed by these learned writers has ever been accepted as a principle of general application under our law.

The most that can be said for Austin’s proposition is that it receives some measure of recognition in the doctrine of marital coercion, which, however, was perhaps evolved out of entirely different considerations (c) ; and that it might possibly be applied in an extreme case of what has been called, in the older authorities, “civil necessity” (d).

Nothing can be said in favour of Stephen’s invented principle of “necessity,” except that his last sentence, italicised above, renders it comparatively harmless. No authority is quoted for it, except a case

(a) Aust., p. 1061.

(b) St. Dig., art. 32 ; St. Hist., II., 108-10.

(c) St. Dig., App. Note 1.

(d) *R. v. Stratton and Others ; R. v. MacGrowther, infra.*

which was actually decided upon very different considerations (e) and an exploded theory propounded by Lord Bacon in the following passage :

“ The law chargeth no man with default where the act is compulsory, and not voluntary, and where there is not a consent and election ; and therefore if either there bee an impossibility for a man to doe otherwise, or so great a perturbation of the judgment and reason as in presumption of law man's nature cannot overcome, such necessity carrieth a privilege in itselfe. Necessity is of three sorts :—necessity of conservation of life, necessity of obedience, and necessity of the act of God or of a stranger. First of conservation of life : If a man steal viands to satisfy his present hunger, this is no felony nor larceny. So, if divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plancke, or on the boat's side, to keepe himselfe above water, and another to save his life thrust him from it, whereby he is drowned, this is neither *se defendendo* nor by misadventure, but justifiable ” (f).

The law regarding the supposed excuse of “ necessity ” is fortunately now settled by the famous case of *R. v. Dudley and Stephens* (g). The two prisoners, with another man named Brooks and a boy, were shipwrecked in the *Mignonette*, and were compelled to drift in an open boat in mid-ocean, a thousand miles from land. On the eighteenth day, when they had been a week without food and five days without water, Dudley proposed to cast lots, who should be killed to save the lives of the others. That was not done ; but on the twentieth day Dudley, with the assent of Stephens but not that of the other man, killed the boy ; and the three men fed on his flesh for four days, after which they were picked up by a ship. At the time of the murder there was no sail in sight and no reasonable prospect of relief ; and starvation was imminent ; the boy, particularly, being in an extremely weak condition.

The jury having returned a special verdict, it was held in the Court for Crown Cases Reserved that there was no proof of any such necessity as could justify the act, and that the prisoners were guilty of murder. Sentence of death was passed upon them, but was commuted by the Home Secretary to six months' hard labour.

In delivering the judgment of the Court, Lord Coleridge, C.J., dealt exhaustively with all the supposed authorities for the alleged excuse

(e) *R. v. Stratton and Others, infra.*

(f) *Bac. Max., Reg. V. : “Necessitas inducit privilegium quoad jura privata.”*

(g) 14 Q. B. D. 273 (1884).

of necessity, and pointed out that they failed to establish any such principle :—

“It is clear that Bracton (*h*) is speaking of necessity in the ordinary sense—the repelling by violence, violence justified so far as it was necessary for the object, any illegal violence used towards oneself. If, says Bracton, the necessity be *evitabilis, et evadere posset absque occisione, tunc erit reus homicidii*. . . .

“It is, if possible, yet clearer that the doctrine contended for receives no support from the great authority of Lord Hale (*i*). It is plain that in his view the necessity which justified homicide is that only which has always been and is now considered a justification.”

As to Sir Michael Foster (*k*), Lord Coleridge said :—

“There is no hint, no trace, of the doctrine now contended for the whole reasoning of the chapter is entirely inconsistent with it.

“In East (*l*) the whole chapter on homicide by necessity is taken up with an elaborate discussion of the limits within which necessity in Sir Michael Foster’s sense of self-defence is a justification of, or excuse for, homicide. There is a short section at the end, very generally and very doubtfully expressed . . . and the conclusion is left by Sir Edward East entirely undetermined.

“What is true of Sir Edward East is true also of Mr. Serjeant Hawkins (*m*). The whole of his chapter on justifiable homicide, of a private nature, is the defence against force of a man’s person, house or goods. In the 26th section we find again the case of the two shipwrecked men and the single plank, with the significant expression of a careful writer : *It is said* to be justifiable. So, too, Dalton, c. 150, clearly considers necessity and self-defence in Sir Michael Foster’s sense of that expression to be convertible terms, though he prints without comment Lord Bacon’s instance. . . . And there is a remarkable passage at p. 339 in which he says that even in the case of a murderous assault upon a man, yet before he may take the life of a man who assaults him, even in self-defence, ‘*cuncta prius tentanda*.’

“The passage in Staundforde, on which almost the whole of the *dicta* we have been considering are built, when it comes to be examined, does not warrant the conclusion which has been derived from it. The necessity to justify homicide must be, he says, inevitable, and the example

(*h*) Bract., II., 277.

(*i*) Hale, I., 51, 54, 478, 491.

(*k*) Fost., Chap. 3.

(*l*) 1 East, P. C., 271.

(*m*) 1 Hawk., c. 28.

which he gives to illustrate his meaning is the very same which has just been cited from Dalton, showing that the necessity he was speaking of was a physical necessity, and the self-defence a defence against physical violence. . . .

"The observations of Lord Mansfield in *R. v. Stratton and Others* (n) . . . have little application to the case before us, which must be decided on very different considerations.

"The one real authority of former times is Lord Bacon (o). . . .

"On this it is to be observed that Lord Bacon's proposition that stealing to satisfy hunger is no larceny is hardly supported by Staundforde, whom he cites for it, and is expressly contradicted by Lord Hale in the passage already cited (p). And for the proposition as to the plank or boat, it is said to be derived from the canonists. At any rate he cites no authority for it, and it must stand upon his own. Lord Bacon was great, even as a lawyer; but it is permissible to much smaller men, relying upon principle and on the authority of others, the equals and even the superiors of Lord Bacon as lawyers, to question the soundness of his *dictum*. There are many conceivable states of things in which it might possibly be true, but if Lord Bacon meant to lay down the broad proposition that a man may save his life by killing, if necessary, an innocent and unoffending neighbour, it certainly is not law at the present day. . . .

"Now, except for the purpose of testing how far the conservation of a man's life is in all cases and under all circumstances an absolute unqualified and paramount duty, we exclude from our consideration all the incidents of war. We are dealing with a case of private homicide, not one imposed upon men in the service of their Sovereign and in the defence of their country.

"Now, it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognised excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called *necessity*. But the temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so. To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it. . . .

(n) 21 St. Tr. 1223 et seq. (*post*, Chap. XII.).

(o) *Supra*.

(p) 1 Hale, P. C., 54.

"It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which is to justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be, No. . . .

"It is quite plain that such a principle, once admitted, might be made the legal cloak for unbridled passion and atrocious crime.

"There is no safe path for judges to tread but to ascertain the law to the best of their ability and to declare it according to their judgment; and if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to exercise that prerogative of mercy which the Constitution has entrusted to the hands fittest to dispense it.

"It is not to be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime. . . ." (q).

The observations of Sir J. F. Stephen upon this case cannot be passed by without notice. They are to the effect that in his opinion the case was rightly decided, but upon the wrong grounds; and that it is to be treated as a case apart from all others, from which no principle can be gathered in derogation from the supposed excuse which he vaguely suggests should be more or less capriciously applied to, or withheld from, such extraordinary cases, as and when they arise (r).

This doctrine would, on the ground of difficulty of definition, leave the law undefined, and constitute the jury not merely judges of fact but special legislators in each case *ex post facto*. It would leave a man without a principle of positive law to guide his actions, at that particular time when he most needed a restraining rule of conduct.

Trying to make *R. v. Dudley and Stephens* of no account, Stephen says:—

(q) Per Lord Coleridge, C.J.

(r) St. Hist., II., 1107.

"The boy was deliberately put to death with a knife, in order that his body might be used for food. This is quite different from any of the following cases :—(1) The two men on a plank. Here, the successful man does *no bodily harm to the other*. *He leaves him the chance of getting another plank*. (2) Several men are roped together on the Alps. They slip; and the weight of the whole party is thrown on one, who cuts the rope to save himself. Here the question is, *not whether some shall die, but whether one shall live*. (3) The choice of evils. The captain of a ship runs down a boat, as the only means of avoiding shipwreck. A surgeon kills a child in the act of birth, as the only way to save the mother. A boat, being too full of passengers to float, some are thrown overboard. Such cases are best decided as they arise" (s).

The supposed distinctions in respect of the two first hypothetical cases may be dismissed as obviously absurd. The passages italicised seem to have been written in a spirit of grim humour.

There can, again, be no distinction as to the throwing overboard of some of the passengers in an overloaded boat. That case obviously falls directly under the principle settled in *R. v. Dudley and Stephens*.

The other two cases suggested, as to the "choice of evils," turn upon entirely different considerations, and have already been considered in their proper place (t).

The *ratio decidendi* in *R. v. Dudley and Stephens* was the broad and salutary principle that, except in defence against acts of oppression, within the well-defined limits of homicide *se et sua defendendo*, no persons are allowed to destroy human life, for the purpose of saving the lives of themselves, or of some of them.

In other words, the law will not recognise any excuse of "natural necessity" as constituting a state of anarchy, in which a man may ignore the ordinary prohibition of active homicidal conduct.

"Necessity," or physical fear, so far from forming a separate ground of excuse, is of importance only as marking the limit to be put upon the recognised excuse of self-defence (u).

Austin's third principle, which alleges as a general ground of excuse "instant and well-grounded fear, stronger than the fear naturally inspired by the law," would probably never have been suggested in that

(s) St. Dig., art. 33, note.

(t) *Ante*, Chap. X.

(u) *Post*, Chap. XII.

form if the learned jurist had lived to perfect his system in the light of the important decision above referred to.

The principle of excuse by reason of coercion or overwhelming fear has, in fact, only two comparatively unimportant applications in our law. One, as Austin indeed observed, bristles with inconsistencies; and the other is of such rare occurrence as to be scarcely worth noticing for any practical purpose in modern times.

I. MARITAL COERCION.

The law with respect to the excuse of marital coercion, which is "at once vague, and bad as far as it goes" (x), is to the effect that, subject to the exception of certain classes of offences, there is always a legal presumption that a crime committed by a woman in the presence of her husband is committed under his coercion; that, unless this presumption is rebutted by the circumstances of the case or by sufficient evidence, it forms a valid defence to criminal proceedings against the woman; but that, where the narrow presumption of law does not apply, actual evidence of coercion by the husband affords no excuse whatever to the wife.

It was formerly open to some doubt (y), but appears now to be clearly established, that the presumption is always rebuttable (z).

"I have always thought that if upon the evidence it can clearly appear that the wife was not drawn to it by her husband, but that she was the principal actor and inciter of it, she is guilty as well as the husband" (a).

Therefore, if the husband be infirm, and obviously incapable of intimidating his wife by physical violence, that fact will afford sufficient rebuttal, as in a case of arson tried before Vaughan, J., where the man, though present at the time, was a cripple and bed-ridden, and it was held, after conference with Tindal, L.C.J., that those circumstances repelled the presumption of coercion on his part (b).

(x) St. Hist., II., 185; cf. St. Dig., App., note 1.

(y) 1 C. & P. 116-17; cf. 8 C. & P. 545, 554-5.

(z) *R. v. Ingram*, 1 Salk. 384 (1712); *R. v. Hughes*, 2 Lew. 229 (1813); *R. v. Dicks*, Russ. 97, n. (1817); *R. v. Dykes*, 15 Cox, 771 (1885), etc.; *infra*.

(a) Hale, I., 516.

(b) *R. v. Pollard*, 8 C. & P. 553, note (g) (1838).

Apart from some such circumstances, there must be, in order to rebut the presumption, some clear evidence from which the jury may reasonably infer that the woman's conduct was independent, and not attributable to fear of, or persuasion by, her husband, although he was present at the perpetration, or during the course, of the offence charged.

In a case where stolen goods were found in the house of a blind man, and evidence thereof was given in support of an indictment against his wife for larceny, she having stated that she had bought the goods, Erle, J., directed the jury that, if they were of opinion that the goods were in the possession of the wife, and without the consent and control of the husband, they must find her guilty; but if they had any doubt of this, they must acquit her. Upon this direction they returned a verdict of not guilty (c).

Again, a husband and wife were jointly tried upon an indictment charging them with feloniously wounding a man with intent to disfigure him. The wife, acting, as the jury expressly found, under her husband's coercion, wrote letters to the prosecutor, pretending that she was a widow, and making an appointment to meet him. She dressed up as a widow, and enticed the man to a lonely spot, where the husband fell upon him and inflicted the injuries complained of. Upon a case reserved, the Court held that the wife could not properly be convicted, Pollock, B., observing :—

“The jury have disposed of this case by their finding. They have found that Sarah Smith was a married woman, that she acted under the coercion of her husband, and that she herself did not personally inflict any violence” (d).

In *R. v. Torpey* (e) there was a joint indictment against husband and wife for robbery with violence, upon which the wife was tried alone, her husband not being in custody. The robbery was committed in a house to which the prosecutor was lured; and certain letters arranging for the tenancy of the house were in the woman's handwriting. Their servant having been sent out on a bogus errand, the woman came behind the prosecutor and placed a chloroformed handkerchief over his mouth, whilst her husband rushed at him from the front and clasped him

(c) *R. v. Banks*, 1 Cox, 238 (1845); cf. *R. v. Matthews*, 1 Den. 596 (1850).

(d) *R. v. Smith*, D. & B. 533 (1858).

(e) 12 Cox, 45 (1871).

round the arms. They strapped him to a sofa, and took a quantity of jewellery from him. At the trial, Russell Gurney, Recorder of London, told the jury:—

“The presumption of law was that if an act of dishonesty were committed by a wife in the presence of her husband, she was acting under his control and coercion, but that presumption might be rebutted by acts otherwise committed by her. The question for their consideration was, whether the part taken by the prisoner showed that she was exercising her own free will, and was not coerced by her husband at the time. . . . The cases were not unanimous on the subject. He must object to the doctrine that a wife was always bound to obey the dictates of her husband. . . . The simple question was, aye or no, did the jury believe that the woman, either in procuring the handkerchief and forcing it upon the prosecutor’s mouth, or in writing the letters and sending the servant to Tulse Hill, or in any other act done by her, was exercising an independent will, or was she acting under her husband’s coercion?”

Upon this direction the jury found the woman not guilty.

In a somewhat similar case, however, where the husband and wife were jointly indicted for having by threats of violence and restraint induced the prosecutor to write and sign an agreement, and it was proved that the wife inveigled the man into a room, when the husband entered and used the threats and force complained of, the jury convicted the woman, under the direction of Brett, J., to the effect that a wife who takes an independent part in the commission of a crime, when her husband is not present, is not protected by her coverture (*f*).

In all such cases the direction to the jury will of course depend upon the particular facts; and the only general principle that can be gathered from precedents is, that in order to support a conviction where the husband has been present, there must be some evidence from which independence and freedom from marital control or influence may be gathered.

There have been numerous cases where especial difficulty has been felt in adjudicating upon the sufficiency of evidence, in rebuttal of the presumption of marital control in connection with larceny, the receiving of stolen property, and various offences involving the unlawful possession of chattels.

(*f*) *R. v. John*, 13 Cox, 100 (1875).

Upon the joint indictment of a husband and wife for stealing curtain pins, in each other's company, Park, J., directed an acquittal of the female prisoner, on the ground that if a man and his wife jointly commit a felony, the wife is entitled to an acquittal (*g*).

Upon a similar charge for the receiving of stolen goods, Graham, B., directed the jury that:—

“Generally speaking, the law does not impute to the wife those offences which she might be presumed to have concurred in by the coercion and influence of her husband, and particularly where his house is made the receptacle of stolen goods; but if the wife appears to have taken an active and independent part, and to have endeavoured to conceal the goods more effectually than her husband could have done, and by her own acts, she would be responsible, as for her own uncontrolled offence” (*h*).

Both prisoners having been convicted upon this direction, the judges held that, as the charge against them was joint, and it had not been left to the jury to say whether the wife had received the goods in the absence of the husband, the conviction of the wife could not be supported, though she had been more active than her husband (*h*).

In *R. v. McClarens* (*i*), upon a similar charge, it was proved that some stolen sugar was received by the husband in his wife's absence; the wife afterwards washed it down the sink, and burnt the bags which had contained it. Coltman, J., directed the jury that—

“If the husband received the property, knowing it to be stolen, and if the wife received it from him with the like knowledge, and with the purpose of aiding and assisting him in the object which he had in view in receiving it . . . although *prima facie* she must be supposed to be acting under the coercion of her husband, that was rebutted by the active part which she took in the matter with the intention above mentioned. But if the part which she took was merely for the purpose of concealing her husband's guilt, and of screening him from the consequences, then she ought to be acquitted. A wife cannot be convicted of harbouring her husband, when he has committed a felony, and the mere circumstance of her attempting to conceal what may lead to his detection appears to come within the same principle.”

A man, his wife, and their child, a boy ten years old, were indicted

(*g*) *R. v. Knight*, 1 C. & P. 116 (1823).

(*h*) *R. v. Archer*, 1 Moo. 143 (1826); cf. *R. v. Matthews*, Den. 596 (1850).

(*i*) 3 Cox, 425 (1849); Russ. 94.

for felonious possession of a mould for making counterfeit coins. The boy was apprehended in the act of passing a counterfeit half-crown, and the officer, going to his home, found the elder male prisoner in an upper room. In the lower room were various coining implements, including the mould in question, and whilst the officers were searching the house the female prisoner came in; she was observed soon afterwards to break the mould on the floor. Counterfeit money was found upon her, but not upon the man.

As to the child, a verdict of acquittal was returned, under the direction of Talfourd, J., who said :—

“I do not think a boy of this age can be convicted upon such evidence as this. He is acting under the control of his parents; they are living in the house where the coining implements are found; and it would be going too far to say that one so young was a joint possessor with them of the property.”

The child was then put in the witness-box by his father to prove that the latter had been absent from home for some weeks before the time of his apprehension, but Talfourd, J., said :—

“The man and woman are living together, and that is evidence from which you are at liberty to infer that they are man and wife. If you think so, and also believe that the man was in possession of these moulds, then you ought to acquit the woman, as she cannot in law be said to have any possession separate from her husband; but if you think that the criminality was on her part alone, and that he was entirely guiltless of any participation in her conduct, then she must be of course convicted. . . . Either of the prisoners may be convicted upon this evidence, but I do not think you can convict both.”

The jury, upon this direction, convicted the man and acquitted the woman (*k*).

It may be observed that the child was directed to be acquitted by reason of his tender age; although the probability of his acting under the control of his parents was referred to, that would not have excused him if he had reached the age of discretion. It was merely a circumstance to be taken into consideration in deciding whether his complicity showed “malice” beyond his years (*l*).

In *R. v. Brooks* (*m*) a woman was indicted alone (her husband having

(*k*) *R. v. Boober*, 4 Cox, 272 (1850).

(*l*) *Ante*, Chap. IV.

(*m*) *Dears*. 184 (1853).

absconded) for feloniously receiving goods stolen from her husband's employer and taken home to her. She was proved to have pawned some of the articles, falsely stating them to be birthday presents; and guilty knowledge on her part was otherwise shown. The jury were directed by the recorder that the presumption of marital control might be rebutted:—

“If, therefore, on considering the evidence, they were perfectly satisfied that at the time when the prisoner received all or any of the articles produced she knew that they were stolen, and in receiving them acted not by reason of any control or coercion of her husband, but voluntarily, and with a dishonest and fraudulent intention, she might be found guilty.”

Upon a case reserved, the conviction was quashed, Parke, B., observing:—

“It is quite clear . . . that the prisoner must have received the stolen goods from the hands of her husband. In that view, it is difficult to see how she could be guilty of this offence” (n).

In a case where a man and his wife were shown to have received stolen property, but the only evidence affecting the wife was not conclusive as to her not having received the goods from her husband, or in his presence, it was held, upon a case reserved, that the questions of receipt from the husband, on the one hand, or separate receipt in his absence, on the other, ought to have been left to the jury, and that it was perfectly consistent with the facts that the goods might have been received by the husband at his own house, and so have come into the wife's possession through her husband, in a manner that did not render her liable to be convicted (o).

In another case, a railway pointsman and his wife were jointly indicted for stealing and receiving some cloth from a railway truck. The wife was seen on the railway bank near her husband's cabin, in a place where there was no road, with a bundle concealed under her shawl. She was watched, and followed to her husband's house; and on the next day she pledged some of the stolen property at two different places, the residue being found at her husband's house. The jury were directed that, if they thought that the woman was acting independently of her husband, and not under his control, and that she was engaged with him

(n) See *vide* Russ. 95, n., *contra*.

(o) *R. v. Wardroper*, Bell, 249 (1860); Russ. 95-6; cf. *R. v. Pritchard*, 9 Cr. A. R. 210 (1913), as to necessary directions to jury, upon joint indictments.

in stealing the goods, they might find her guilty of the theft. She was found guilty, and the conviction was affirmed by the Court, without argument (p).

In *R. v. Baines and Others* (q) the jury, who found a husband and wife, among other persons, guilty of receiving stolen goods, were not expressly asked to say whether there was a separate receiving by the wife in the absence of the husband. After sentence, counsel cited *R. v. Archer* (r), and the point was then put to the jury, who found the female prisoner guilty of a separate receiving. Upon appeal, the conviction was affirmed; Lord Russell, C.J., saying :—

“ There is no reason why we are not to presume that the chairman rightly directed the jury on the general law, but the point is raised that he did not specifically put to them the question whether there was a separate receiving by the female prisoner. That there was ample evidence of a separate receiving by her cannot be doubted. . . . There is no question that she had received some portion of the stolen property, and that she was not then acting under the influence of her husband. In such a state of facts the judge ought to tell the jury that the mere fact of the marital relation does not raise any presumption of the husband's control. Further, even if the husband was in the neighbourhood, it was a question for them whether the wife was taking an independent part. *Brown v. Attorney-General of New Zealand* (s) is an authority for that proposition.”

Wright, J., added that the question after sentence was probably put to the jury by the chairman, “ not as part of the procedure, but in order to satisfy himself whether there was any ground for reducing the sentence ” (t).

In a recent important case it was pointed out by the Court of Criminal Appeal that the mere fact that there was a preconcerted scheme between husband and wife to commit the crime charged against them does not rebut the presumption of coercion, but might on the contrary be regarded as supporting it; because collusion may well be accompanied by coercion :—

“ The prisoners are Arabs, and presumably Moslems, but as counsel for the Crown raises no question upon it we need not consider how far

(p) *R. v. Cohen*, 18 L. T. 489 (1868).

(q) 16 T. L. R. 413 (1900).

(r) *Supra*.

(s) *Infra*.

(t) 16 T. L. R. 413, *sed qu.*

this presumption applies in the case of persons who are permitted to be polygamous by the law of their religion or their domicile. . . . They were jointly indicted for larceny. . . . What the woman did was done in the presence of her husband. He could have seen her, and she him, at any time during the transaction, and therefore they were in the presence of one another. . . . It was, accordingly, necessary to direct the jury carefully what evidence was sufficient to rebut the presumption, and it should have been explained to them what amounted to acting voluntarily, and to what extent her conduct must be independent before she could be treated as a guilty person. The recorder seems to have formed some misconception as to the effect of a pre-concerted arrangement between husband and wife. He failed to appreciate that the very fact of such an arrangement might be evidence, and perhaps strong evidence, that the husband had been coercing his wife. He seems to have thought that if there was such an arrangement, which he calls *collusion*, that was enough by itself to rebut the presumption of coercion. . . . The defence was not left to the jury in a way in which they could do it justice, and we are therefore of opinion that the conviction must be quashed " (u).

From the foregoing decisions it will be seen that there has in times past been an extraordinary amount of confusion in connection with the rebutting of the presumption of marital control, and that there is still room for considerable doubt and difficulty in the practical application of the doctrine, wherever the presumption arises.

There has been similar confusion and inconsistency in determining the classes of crimes to which the presumption does, and those to which it does not, apply.

At one time it was thought to apply only to felonies, and not to misdemeanours (x) ; but any possibility of entertaining that notion has long since disappeared (y).

One would hardly expect to find the white slave traffic singled out as a class of offences to which the general doctrine of marital coercion does not apply ; yet Hawkins wrote :—

" A wife may be indicted together with her husband, and condemned to the pillory with him for keeping a bawdy house ; for this is an offence as to the government of the house, in which the wife has a principal

(u) *R. v. Caroubi*, 7 Cr. A. R. 149 (1912).

(x) Vide *R. v. Cruse*, 8 C. & P. 541, 558.

(y) St. Dig., art. 31 ; *R. v. Price*, *R. v. Dicks*, *ub. inf.*

share; and also such an offence, as may generally be presumed to be managed by the intrigues of her sex" (z).

And so it was held, after argument at the bar, in *R. v. Williams* (a).

The presumption of coercion by the husband "doth not excuse in case of treason, nor of murder, in regard to the heinousness of those crimes" (b). Nor does it apply to manslaughter (c). But apparently it does apply to a case of attempted double suicide, so as to excuse the wife who survives, in respect of the murder of her husband, who dies; at least, it appears to have been so decided in an ancient case cited by Pattenon, J. (d). A husband and wife being in great distress, the husband said: "I am weary of life, and will destroy myself"; upon which the wife replied: "Then I will die with you"; at the man's request the wife bought some ratsbane, and they both partook of it. The man died, but the wife made herself sick by drinking salad oil, and so survived. She was acquitted of murder, solely on the ground that being the wife of the deceased, she was under his control; and inasmuch as the proposal to commit suicide emanated from him, it was considered that she was not a free agent" (e).

Subject to the exceptions above mentioned, the presumption and the excuse attaching thereto appear to be applicable to all criminal offences, whether accompanied by violence or not—e.g., to burglary (f), robbery (g), larceny (h), receiving (i), coinage offences (k), arson (l), forgery (m),

(z) 1 Hawk., c. 1, s. 12.

(a) 10 Mod. 63; 8 C. & P. 20, n. (1712); cf. *R. v. Ingram*, 1 Salk. 384 (1712); *R. v. Dixon*, ib. (1716).

(b) Hale, I., 45; *Somerville's Case*, 1 And. 104 (1583); *Somerset's Case*, 3 Inst. 50; 2 St. Tr. 951, 957 (1616); *R. v. Squire*, Russ. 93 (1799); *R. v. Manning*, 2 C. & K. 887, 904 (1849); *sed vide* Russ. 92-3, n.

(c) Hale, I., 46.

(d) In *R. v. Alison*, 8 C. & P. 418.

(e) *Anon* (1604), Moore, 754; Russ. 661.

(f) Hale, I., 32; *R. v. Wharton*, Kcl. 37 (1664); *R. v. Williams*, *ub. sup.*; *R. v. Knight*, *ub. sup.*

(g) *R. v. Cruse*, 8 C. & P. 541, 545; *R. v. Torpey*, *ub. sup.*; *R. v. Dykes*, 15 Cox, 771 (1885), reversing 1 Hawk., c. 1, s. 11; *et vide R. v. Buncombe*, 1 Cox, 183 (1845).

(h) Hale, I., 516; *R. v. Knight*, *R. v. Cohen*, *R. v. Caroubi*, *ub. sup.*

(i) *R. v. Banks*, *R. v. Matthews*, *R. v. Archer*, *R. v. McClarens*, *R. v. Brooks*, *R. v. Wardroper*, *R. v. Baines*, *ub. sup.*

(k) *R. v. Boober*, *ub. sup.*; *R. v. Connolly*, *R. v. Price*, *ub. inf.*

(l) *R. v. Pollard*, *ub. sup.*; cf. Kenny, Outl., 71, n.

(m) *R. v. Hughes*, *ub. inf.*

uttering forged notes (*n*), wounding (*o*), and sending threatening letters (*p*).

The presumption applies only where there has been a lawful marriage between the parties, before the commission of the offence (*g*); but the question of coverture is one for the jury, and may be decided upon any evidence which they think satisfactory (*r*), even where the female prisoner has been indicted as a single woman, and has pleaded to the indictment in that form (*s*). Evidence of cohabitation and reputation may suffice (*t*); and, where the married relation of two co-defendants appears on the face of the indictment against them, no evidence need be called to prove it (*u*).

A recent decision of the Court of Criminal Appeal has gone so far as to quash, on the sole ground of presumed coercion, the conviction of a married woman, indicted and convicted jointly with her husband, where the relationship of marriage was not disclosed at the trial, or put forward as a ground of appeal, but was indeed denied throughout by the female prisoner, whose defence was that she had no connection with, and did not know, the other prisoner, in whose company she was caught thieving (*x*).

As has already been noticed, the presumption of marital control arises only when the husband has actually been present at the commission of the offence charged against the wife, or at least during some essential part of its perpetration. If, by reason of his absence, the presumption does not apply, any amount of substantive proof, showing actual fear on the part of the wife, or coercion or influence on the part of the husband, will be entirely immaterial.

In other words, marital coercion is no defence whatever, except where the narrow presumption of law happens to apply, and not to be rebutted by sufficient proof of the wife's independence.

(*n*) *R. v. Atkinson*, cit. 8 C. & P. 557; Russ. 94 (1814); *R. v. Morris*, *ub. inf.*

(*o*) *R. v. Smith*, *ub. sup.*

(*p*) *R. v. Hammond*, 1 Leach, 447 (1787).

(*q*) *R. v. Jones*, Kel. 37 (1664).

(*r*) *R. v. Hassall*, 2 C. & P. 434 (1826).

(*s*) *R. v. Woodward*, 8 C. & P. 561 (1838); cf. *R. v. Quinn*, 1 Lew. 1 (1825).

(*t*) *R. v. Atkinson*, Russ. 100 (1814); *R. v. Boober*, *ub. sup.* (1850); et vide *R. v. Good*, 1 C. & K. 185 (1842); Russ. 100, note (v).

(*u*) *R. v. Knight*, *ub. sup.* (1823).

(*x*) *R. v. Green*, 30 T. L. R. 170 (1913).

"The mere fact that the parties are married never even formed a presumption of compulsion by the husband. Even as early as Bracton's time, if the wife was voluntarily a party to the commission of a crime, her coverture furnished no defence. . . . (y)."

"Questions have from time to time arisen how far the mere presence of the husband at the time of the commission of the offence should furnish a presumption of marital control, and the decisions on that subject have not been entirely uniform" (z).

Some fine distinctions seem to have been drawn as to what is sufficient to constitute presence by the husband at the time and place of the wife's crime.

Presence merely in the neighbourhood may suffice, but as regards the point of time the rule is more strict, for the husband must at least be present at some time during the main transaction, or essential perpetration of the offence charged.

Upon the trial of a wife for uttering a forged note, and of her husband for procuring her to commit the offence, it being proved that he ordered her to do it, but that she did it in his absence, the judges held, on a case reserved, that the presumption of coercion did not arise, as the husband was absent at the time, and that both parties were properly convicted (a).

In *R. v. Hughes* (b) a married woman was indicted for forging and uttering Bank of England notes. The principal witness went to a shop kept by the prisoner's husband, who was not present, and bought from the prisoner three £2 notes, at £1 4s. each. He paid the woman £4, and before he had received the change the husband looked into the room. He did not enter, but merely made the pointed observation: "Get on with you." After this the witness and the prisoner returned into the shop where the husband was; the prisoner gave him the change, and both she and her husband warned him to be careful.

The defence of coercion being raised, Thomson, B., said:—

"I am very clear as to the law on this point. The law, out of tenderness to the wife, if a felony be committed in the presence of the husband, raises a presumption *prima facie* and *prima facie* only, as is clearly laid down by Lord Hale, that it was done under his coercion: but it is absolutely necessary that the husband should in such a case be actually

(y) Bract., Lib. III., c. 32.

(z) Per Lord Halsbury, L.C., *Brown v. A.-G. of New Zealand*, 1898, A. C., 234.

(a) *R. v. Morris*, R. & R. 270 (1814).

(b) 2 Lew. 229, Russ. 99 (1813).

present, and taking a part in the transaction. Here it is entirely the act of the wife; it is indeed in consequence of a communication previously with the husband that the witness applies to the wife; but she is ready to deal, and has on her person the articles which she delivers to the witness. There was a putting off before the husband came: and it is sufficient if before that time she did that which was necessary to complete the crime. The coercion must be at the time of the act done, and then the law out of tenderness refers it *primâ facie* to the coercion of the husband. But when the crime has been completed in his absence, no subsequent act of his (although it might possibly make him an accessory to the felony of the wife) can be referred to what was done in his absence" (c).

On the other hand, where a wife went from shop to shop, uttering base coin, and her husband accompanied her to the door each time, without going in, Bayley, J., directed the woman's acquittal, on the ground of coercion (d).

This decision was relied on where a husband and wife were jointly indicted for uttering base coin, but the wife appeared to have taken no active part in the offence. The Common Serjeant, after consulting Bosanquet and Coltman, JJ., directed the acquittal of the woman, saying:—

"The same rule which applies in cases of felony should also apply to cases of misdemeanour like the present, and the decision of Bayley, J., who is a very good authority, seems to bear out that view" (e).

There are one or two exemptions, applicable to married women, which appear to be altogether independent of the ancient presumption as to coercion.

Thus, the law permits no married woman to be convicted of treason merely for receiving or harbouring her traitorous husband (f); nor as an accessory after the fact, for receiving or comforting him after he has committed a felony (g); indeed, she may, apparently, with impunity carry the principle of conjugal fidelity to the extent of concealing her husband's felony, so long as her complicity is merely for the purpose of

(c) Russ. 99.

(d) *R. v. Connolly*, cit. 8 C. & P. 21 (1829).

(e) *R. v. Price*, 8 C. & P. 19 (1837).

(f) Hale, I., 47-8, et vide 621; 1 Hawk., c. 1, s. 10.

(g) *R. v. Manning*, 2 C. & K. 887, 904 (1849).

screening him, and does not amount to actual participation in the crime (*h*).

"Whether she can be guilty of misprision of treason, if she knows her husband's treason, and reveal it not, is a case of some difficulty. . . . It may be said she is *sub potestate viri*, she cannot by law be a witness against her husband, and therefore cannot accuse him, *ideo quære*" (*i*).

She may also receive, jointly with her husband, a third party who is a traitor or felon (*k*); and she is not capable of conspiracy with her husband alone, they being one person (*l*).

Such exceptions as these are perhaps reasonable, in view of the unique intimacy of the conjugal relation (*m*).

Upon the obvious absurdity of the privilege afforded to wives, in respect of crimes committed in the presence of their husbands, little comment need be made; for the excuse of marital coercion has been severely criticised by the most eminent writers, and is constantly the subject of adverse comment in the Courts.

A pointed example of its injustice is that suggested by Stephen:—

"A husband and wife of mature age and their daughter of fifteen commit a theft. It is proved that the girl acted under actual threats used by her father. Nothing appears as to the wife's part in the matter, except that her husband was present when she committed the offence. The wife must be acquitted on account of the presumed coercion of her husband: the daughter must be convicted, notwithstanding the actual coercion of her father" (*n*).

One can hardly wonder that another learned writer was so sure, thirty years ago, that the absurd doctrine would be speedily abolished, that he wrote of it in the past tense (*o*).

The allowance of such an excuse is not justified by the probabilities of married life at the present day, whatever reasons may have given rise

(*h*) *R. v. McClarens*, *supra*.

(*i*) Hale, I., 45.

(*k*) Hale, I., 48, 621; *Dey's Case*, cit. 8 C. & P. 553 (1364).

(*l*) 1 Hawk., c. 72, s. 8; Y. B. 38 Edw. 3, pl. 3; et vide 132 L. T. N. 399.

(*m*) Cf. *R. v. Fine*, 77 J. P. 79 (1913), as to whether a woman living with her husband can be recommended for expulsion under sect. 3 of the Aliens Act, 1905.

(*n*) St. Hist., II., 105-6.

(*o*) Clark, Anal., 38-9.

to it in earlier times, when the *potestas viri* was a reality, and when female offenders were less self-assertive, and more easily coerced, than they commonly are now.

The origins and reasons of the excuse, of the presumption giving rise to it, and of the strict limitation thereof respectively to acts done by the wife in the presence of the husband, are all matters of conjecture and mystery.

Some of the older authorities for the excuse (*p*) were collected by the late Sir J. F. Stephen (*q*), who seems to have attached undue importance to a chance suggestion thrown out by Lord Hale :—

“ If the husband and wife together commit larceny or burglary, by the opinion of Bracton, both are guilty ; and so it hath been practised by some judges. And possibly, in strictness of law, unless the actual coercion of the husband appears, she may be guilty in such a case ; for it may many times fall out that the husband doth commit larceny by the instigation, though he cannot in law do it by the coercion, of his wife ; but the latter practice hath obtained, that if the husband and wife commit burglary and larceny together, the wife shall be acquitted, and the husband only convicted ; and with this agrees the old book 2 E. III., Corone, 160. And this being the modern practice, and *in favorem vitæ*, is fittest to be followed ; and the rather because otherwise for the same felony the husband may be saved by the benefit of his clergy, and the wife hanged, where the case is within clergy, though I confess this reason is but of small value ; for in manslaughter committed jointly by husband and wife the husband may have his clergy, and yet the wife is not on that account to be privileged by her coverture ” (*r*).

Upon this passage Stephen made the following comment :—

“ This extract probably gives the key to the confusion of the law upon this subject. It was thought hard that a woman should be hanged for a theft for which her husband had his clergy, and accordingly a loophole was devised for married women, similar, as far as theft was concerned, to clergy for men. Hale’s remark as to manslaughter shows how incomplete and unsystematic the arrangement was ” (*s*).

Perhaps misled by Hale’s discursive method, Stephen seems here to

(*p*) Bract., III., 32 ; Lib. Ass. 27 Edw. 3, pl. 40 ; 3 Inst. c. 47, p. 108 ; Bac. Max., Reg. V. ; Dalt., c. 157 ; Hale, I., 45, etc.

(*q*) St. Dig., App., note 1.

(*r*) Hale, I., 45.

(*s*) St. Dig., pp. 398-9 ; cf. Kenny, Outl., p. 72.

have confused two things ; the origin of the presumption as now applied, and the origin of the peculiar excuse in favour of married women.

Whatever slight connection benefit of clergy may have had with the narrow presumption in which the excuse of marital coercion has ultimately become embodied, it certainly had nothing whatever to do with the origin of the excuse itself ; for marital coercion was recognised as a ground of immunity by the Laws of Ina, King of the West Saxons (*t*), and Canute (*u*), to both of whom benefit of clergy was an idea undiscovered and unthought of, and either of whom would probably have been piously shocked if it had been revealed to him that an ecclesiastical immunity, which would in the course of ages be invented for the protection of priests, would not only be openly used for saving the necks of married men, but also ingeniously cited as a pretext for the acquittal of their guilty wives.

“ Si maritus aliquid deprædetur, et persuadent ad id uxorem suam, et deprehensus sit in eo vir, tunc suam partem compenset ille, *excepta uxore, quoniam ipsa superiori suo obedire debet*. Si ea jurjurando confirmare audeat, se cum depredato non participasse, sumat tertiam ejus portionem ” (*x*).

The reason assigned for the ancient doctrine in this passage is identical with the ground alleged many centuries later by Lord Hale and other authorities, that the wife is *sub potestate viri*.

There is a striking parallel between certain exceptional kinds of theft, enumerated in the laws of Canute as involving liability on the part of the woman, and those specified by Bracton in the thirteenth century :—

“ Et si quis rem furto ablatam domum in casam suam adferat, et ille intercipiatur, justum est, ut habeat id quod postea quaesivit, et nisi sub uxoris suae sera custoditum fuerit, sit ea munda : *sed claves illas ipsa custodire debet, hoc est thesauri sui, et cistæ suae et scrinii sui, si sub uno horum custoditum sit, tunc illa rea sit ; nec potest uxor aliqua marito interdicere, ne quodcunque velit in domum suam congreget* ” (*y*).

“ In certis vero casibus de furto tenebitur, si furtum inveniatur sub clavibus uxoris, quas quidam claves habere debet uxor sub custodia et cura sua. Claves videlicet dispensæ suæ, archæ suæ, et scrinii sui ;

(*t*) A. D. 712.

(*u*) A. D. 1016.

(*x*) Leges Inæ, Wilk. 24, s. 57, *De coloni furto*.

(*y*) Leges Cnuti, Wilk. 145, par. 74.

et si aliquando furtum sub clavibus istis inveniatur, uxor cum viro culpabilis erit" (z).

The *clergy* theory propounded by Stephen, which seems to have had no better foundation than the somewhat contemptuous *obiter scriptum* of Lord Hale, can at most account for the modern limitation put upon the doctrine of marital coercion. It does not explain how, when, and why married women acquired the unique prerogative of committing crimes with impunity, under colour of that plea of subjection to the authority of another, which has always been jealously denied by our law to children acting in obedience to their parents, to servants committing crimes under their masters' orders, and even to Ministers of State carrying out the Royal commands.

The presumption is no doubt founded on the excuse of physical fear ; but nowhere else does the law allow that excuse to be pleaded, in times of peace, as justifying conduct which would otherwise be criminal.

"If a man be menaced with death, unless he will commit an act of treason, murder or robbery, the fear of death does not excuse him, if he commit the fact ; for the law hath provided a sufficient remedy against such fears by applying himself to the Courts and officers of justice for a writ or precept *de securitate pacis*.

"Again, if a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact ; for he ought rather to die himself, than to kill an innocent" (a).

Upon this passage from Hale, Stephen makes the following comment, which applies to the case of married women with as much force as to any other cases of coercion or duress :—

"Whatever may be thought of the reasoning of Hale, I think that the principle which he lays down may be defended on grounds of expediency.

"Criminal law is itself a system of compulsion on the widest scale. It is a collection of threats of injury to life liberty and property if people do commit crimes. Are such threats to be withdrawn so soon as they are encountered by opposing threats ? The law says to a man intending to commit murder, If you do it, I will hang you. Is the law to withdraw its threat if someone else says, If you do not do it, I will shoot you ?

(z) Bract., III., 32.

(a) Hale, I., 49.

"Surely it is at the moment when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary" (b).

There are difficulties enough in securing the observance of the law by females, and restraining their criminal activities, without the entirely unnecessary and unjustifiable licence possessed by every married woman to commit crime in her husband's presence. Probably the most ardent defender of women's rights would agree that wives ought to have equal responsibility with other people, and that they should come under the two established rules, that no one has a right to make himself a party to committing mischief, from a fear of consequences to himself, or to plead apprehension of personal danger as an excuse for assisting in doing an illegal act (c); and that an inferior who takes part in transactions which he knows to be illegal is liable to conviction, even though every act he performs is done in pursuance of the orders of another person (d).

II. COERCION BY KING'S ENEMIES.

"There is to be observed a difference between the times of war, or public insurrection, or rebellion, and the times of peace; for in the times of war, and public rebellion, when a person is under so great a power, that he cannot resist or avoid, the law in some cases allows an impunity for parties compelled, or drawn by fear of death, to do some acts in themselves capital, which admit no excuse in the time of peace. . .

"But even in such cases, if the whole circumstances of the case be such, that he can sufficiently resist, or avoid the power of such rebels, he is inexcusable, if upon a pretence of fear, or doubt of compulsion, he assist them" (e).

The leading case on this subject was that of a lieutenant in the Jacobite army, who, having joined in the Young Pretender's rebellion, pleaded at his trial that he had been forced into it by threats on the part of the Duke of Perth and his men. Lee, L.C.J., said, in summing up :—

"The fear of having houses burnt, or goods spoiled, supposing that to have been the case of the prisoner, is no excuse in the eye of the law for joining and marching with rebels. The only force that doth excuse, is a force upon the person, and present fear of death; and this

(b) St. Hist., II., 107.

(c) *R. v. Tyler and Price*, 8 C. & P. 616, per Lord Denman, C.J. (1838).

(d) *R. v. Bernard*, 1 Cr. A. R. 218 (1908).

(e) Hale, I., 49.

force and fear must continue all the time the party remains with the rebels. It is incumbent on every man, who makes force his defence, to show an actual force, and that he quitted the service as soon as he could, agreeable to the rule laid down in *Oldcastle's Case* (f) that they joined *pro timore mortis et recesserunt quam cito potuerunt.*"

The prisoner was convicted, but reprieved (g).

In *R. v. Crutchley* (h), upon an indictment for destroying a threshing machine (i), the act having been fully proved, a witness was allowed to depose to the effect that the mob, by whom the machine was broken, forced the prisoner and other persons to go with them, and then compelled each person to give one blow to the machine with a sledge-hammer; and further that the prisoner ran away from the mob at his earliest opportunity. Upon this evidence the prisoner was acquitted.

The clear contrast between coercion by public rebels or rioters in some number, and coercion by individuals, is illustrated by *R. v. Tyler and Price* (k), where a madman gathered together a number of persons near Canterbury, promising them plenty in this world and happiness in the next, and pretending to be a Divine being. A constable, endeavouring to effect his arrest under a warrant, met with resistance, and was assisted by his brother. The madman endeavoured to stab the constable, shot his brother, and then hacked the latter with a sword; and under his orders the prisoner with two other persons took the deceased, while still alive, and threw him into a dry ditch, where they left him. It was held that any apprehension which the two prisoners entertained of personal violence to themselves afforded no excuse for their conduct in remaining with and assisting the madman in his acts of violence.

(f) Hale, I., 50.

(g) *R. v. McGrowther*, 18 St. Tr. 391 (1746).

(h) 5 C. & P. 133 (1831).

(i) Under 7 & 8 Geo. 4, c. 30, s. 4.

(k) 8 C. & P. 116 (1838).

CHAPTER XII.

OCCASIONAL LICENCE.

THE various immunities from punishment which have been considered up to this point have been such as are essentially personal to the party exempted.

Under the principle of intentionality, if there be any incapacity or unavoidable failure to range the facts or circumstances under the law applicable thereto, there is an absence of *mens rea*, and no culpable intention can be formed (*a*). The essence of this excuse lies in the state of mind of the party, with reference to the law, the facts, and the conduct in question.

Upon the principle of absolute compulsion, if the apparent breach of law depended in no degree upon the party's wishes, there is no *actus reus*, or conduct in respect of which *mens rea* or intentionality can arise (*b*). The essence of this excuse lies in the party's total inability to obey the law.

Under the principle of coercion, in the one or two rare cases where it applies, the party, being proved or presumed to have acted under the dictates of overwhelming fear, is again excused on the purely personal ground that his (or her) conduct was unfairly restricted (*c*).

In all these cases, therefore, the plea of immunity arises solely out of the mental attitude or personal incapacity of the party.

On the other hand, the excuses now to be considered are based, not upon the personal inability of the party to obey the law, but upon a definite licence attached by law to certain specified occasions, whereby *nefas* becomes *fas*; and that which at other times or on other occasions would be wrong and criminal is, subject to definite restrictions, made right and lawful, only *pro hac vice*.

The general principle of excusability, that an act which is done in

(*a*) *Ante*, Chaps. I. to IX.

(*b*) *Ante*, Chap. X.

(*c*) *Ante*, Chap. XI.

pursuance of a legal right cannot be a crime, amounts to no more than the truism that a thing cannot at one and the same time be both right and wrong.

It requires little wisdom to perceive that a man cannot steal his own property and therefore that it cannot be a crime for him to take it. Even if that fact were not expressly recognised in the definition of larceny, as the felonious taking of the goods of another, it would obviously arise from the necessity of things.

So, again, a man may cut or maim himself if he pleases to be so foolish, or may flagellate himself if he chooses to be so pious, because he has a legal right to use his own body as he likes, and the law prohibiting battery and wounding are subject to his right of personal liberty—so long indeed as he respects the value of his life, whereof he has no right wilfully and feloniously to deprive the community (d).

No difficulty arises out of these and other similar instances of the general inapplicability of the criminal laws to acts done or omitted in pursuance of a legal right.

The difficulty arising in connection with the axiomatic principle under discussion is, not to ascertain the recognition of those general rights which lie altogether outside the apparent scope of the criminal law, but to define with precision certain exceptional rights, or licences, of an occasional nature, the sole importance of which consists in their legalising what would otherwise be unlawful conduct.

Before examining the chief cases of exceptional and occasional licence, it may perhaps be observed that Austin's division of justification or excusability into two separate principles of legal *right* and legal *duty* is now of little significance either in theory or in practice.

Whatever one is bound to do, one must have the right to do; and the law justifies whatever it requires, together with all reasonable means used to attain the proper end. *Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud* (e): which, though not elegant, has the merit of being obvious.

The sole remaining importance of the distinction between justification and excuse, since the abolition of forfeitures, lies in the propriety of extending to a man a somewhat greater latitude in the compulsory

(d) Vide 1 East, P. C. 219; cf. Kenny, *Ouel.*, 112-4.

(e) 5 Rep. 115 b.

execution of a duty imposed upon him by law, than that which may be allowed to him in the exercise of a right or licence barely permitted to him for his own protection in an emergency (f).

I. SELF-DEFENCE.

The excuse sometimes allowed to a prisoner, that the act charged against him was done *se vel sua defendendo*, is in the old books usually referred to as the excuse of *natural necessity*. It is, however, of much narrower scope than the supposed excuse of necessity propounded by Stephen (g), being rigidly confined to the actual and necessary repelling of unlawful violence directed against the defendant, against his property, or against certain persons whom he may be bound by legal or moral duty to protect (h).

The word "necessity," even if understood as applying merely to the excuses of self-defence or self-assistance, is indeed somewhat misleading, as tending to obscure the fact that those excuses are allowable by law only within the limits of several well-defined conditions, of which the important obligation of keeping within the requirements of the occasion is one, but only one.

Although the plea of self-defence may be said to be founded upon necessity, in the sense of being obviously consonant with justice and expediency, in securing the instant repression or prevention of crime, it must not be inferred that a person is at every turn justified thereby in dispensing with the ordinary forms of legal procedure or in using personal violence as a means of asserting his rights or of repelling ordinary wrongs (i).

The excuse of self-defence ought to be distinguished from that of self-assistance, for it is only where some violence to a man's person (or to one whom he is bound by close relationship of blood, marriage or service to protect) is suffered or reasonably apprehended, that the principle of blow for blow and force against force becomes applicable: "*vim enim vi defendere omnes leges omniaque jura permittunt*" (k).

With regard to the infliction of mortal blows, a distinction is drawn

(f) Fost., 270-2.

(g) St. Dig., art. 32.

(h) Vide *R. v. Dudley and Stephens*, per Lord Coleridge, C.J., *ante*, Chap. XI.

(i) Dicey, 439-490; *R. v. Moir*, *infra*.

(k) Paulus, Dig., IX., 2, 45, 4.

by Foster between justifiable self-defence, where the prisoner's conduct is entirely limited to the repelling of an attack made upon him, and excusable self-defence upon chance-medley, which formerly involved forfeiture of goods (*l*). The distinction, which is almost as important now as ever it was, is best described in Foster's own words (*m*):—

“There are cases in which a man may without retreating oppose force to force, even to the death. This I call justifiable self-defence. . . . There are cases in which the defendant cannot avail himself of the plea of self-defence without showing that he retreated as far as he could with safety, and then, merely for the preservation of his own life, killed the assailant. This I call self-defence culpable, but through the benignity of the law excusable. In the case of justifiable self-defence, the injured party may repel force by force in defence of his person, habitation or property, against one who manifestly intendeth and endeavoureth by violence or surprise to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if in a conflict between them he happeneth to kill, such killing is justifiable. . . .

“I will by way of illustration state a few cases which I conceive are reducible to this head of justifiable self-defence.

“Where a known felony is attempted upon the person, be it to rob or murder, here the party assaulted may repel force by force (*n*); and even his servant then attendant on him (*o*) or any other person present may interpose for preventing mischief; and if death ensueth the party so interposing will be justified. . . .

“A woman in defence of her chastity may lawfully kill (*p*) a person attempting to commit a rape upon her. . . .

“An attempt is made to commit arson or burglary in the habitation: the owner or any part of his family, or even a lodger with him may lawfully kill the assailants for preventing the mischief intended. . . . (*q*).

“I will now proceed to that sort of self-defence which is culpable and, through the benignity of the law, excusable; and this species of self-defence I choose, upon the authority of the statute of Henry VIII. (*r*) to distinguish from the other by the name of homicide *se defendendo* upon chance-medley. The term chance-medley hath been very impro-

(*l*) See now 24 & 25 Vict. c. 100, s. 7, re-enacting 9 Geo. 4, c. 31, s. 10.

(*m*) Cf. Hale, I., 478—480.

(*n*) Hale, I., 481.

(*o*) Ib. 483.

(*p*) Ib. 474.

(*q*) *R. v. Cooper*, Cro. Car. 544 (1639).

(*r*) 24 Hen. 8, c. 25.

perly applied to the case of accidental death, and in vulgar speech we generally affix that single idea to it: but the ancient legal notion of homicide by chance-medley was when death issued from a combat between the parties upon a sudden quarrel. . . . (s).

"A sudden casual affray commenced and carried on in heat of blood, and consequently *self-defence upon chance-medley*, must, as I apprehend, imply that the person when engaged in a sudden affray quitted the combat before a mortal wound given, and retreated or fled as far as he could with safety, and then, urged by mere necessity, killed his adversary for the preservation of his own life.

"This case bordereth very nearly upon manslaughter, and in fact and experience the boundaries are in some instances scarcely perceivable; but in consideration of law they have been fixed. In both cases it is supposed that passion hath kindled on each side, and blows have passed between the parties; but in a case of manslaughter it is either presumed that the combat on both sides hath continued to the time that the mortal stroke was given, or that the party giving such stroke was not at that time in imminent danger of death. He therefore who, in the case of mutual conflict, would excuse himself upon the foot of self-defence must show that, before a mortal stroke given, he had declined any further combat and retreated as far as he could with safety, and also that he killed his adversary through mere necessity, and to avoid immediate death. If he faileth in either of these circumstances, he will incur the penalties of manslaughter" (t).

The allowance of this excuse of self-defence upon chance-medley, coupled with the condition which requires a retreat before the delivery of the mortal stroke, is a remarkable instance of the subtlety with which, in times of greater violence than our own, the rigour of the law was tempered by considerations of expediency.

Where two persons fight upon a sudden quarrel, one killing the other is guilty of murder or manslaughter, according to the degree of provocation or the circumstances of the case. But it is obviously in the interests of peace to allow either party, even in the heat of combat, a *locus poenitentiae* before homicide is actually perpetrated. If the fighting were prearranged between the parties, it would be different (u), for in that case they would both have had their *locus poenitentiae*.

Upon this ground, where the quarrel is sudden, if one of the combatants avail himself of an opportunity to desist from the combat,

(s) 3 Inst. 55, 57; Kel. 67.

(t) Fost. 273-7.

(u) Vide Hale, I., 452; 1 East, P. C. 284-5.

and retreat as far as possible, the law forthwith absolves him; and, if pursued, he is entitled to use the same measure (but no more) of self-defence as if he had not willingly fought at all (x).

Dakin's Case (y) seems to have been on the border line between the two kinds of self-defence mentioned by Foster. The prisoner was indicted for manslaughter. Several persons knocking violently at the door of the house where he was lodging, he admitted them, and a scrimmage immediately took place. A witness succeeded in pushing the prisoner into the house and locked the door, but two minutes afterwards several men came and knocked the door down. The prisoner then took the fire-tongs, and with these ran after the persons who had broken into the house and struck about him. The witness deposed that he saw two persons on the prisoner at one time, hitting at him as hard as they could; that the deceased was one of them; that they split the door open, because they wanted to get him out to ill-use him. The prisoner could have got out of the house by a back way, though it did not appear that he knew of the back way at the time, it being the first night of his lodging there. Bayley, J., in directing the jury, said:—

“If you are of opinion that the prisoner used no more violence than was necessary to defend himself from the attack made upon him, you will acquit him. The law says a man must not make an attack upon others unless he can justify a full conviction in his own mind that, if he does not do so, his own life will be in more danger. If the prisoner had known of the back way, it would have been his duty to have gone out backwards, in order to avoid the conflict” (z).

The jury very properly acquitted the prisoner.

Although Foster, whose observations on the subject are confined to the case of homicide, speaks only of a “mortal stroke,” there can hardly be room for doubt that the law of self-defence upon chance-medley is equally applicable to crimes short of murder or manslaughter, and that the peculiar indulgence allowed by law in cases of retreat from a sudden quarrel would, for example, be available as a plea against conviction upon an indictment for wounding with intent to kill or do

(x) *R. v. Smith*, 8 C. & P. 160 (1837).

(y) 1 Lew. 166 (1828).

(z) *Sed quære*, vide *R. v. Cooper*, *ul. sup.*, 1 East, P. C. 289; Fost. 274; Russ. 811, note (e).

- grievous bodily harm, or for the misdemeanour of unlawful wounding. The justification which would excuse a mortal stroke must necessarily include a justification for delivering a stroke less than mortal.

The two essential conditions of the plea of self-defence, in whatever circumstances and against whatever charge that plea may be set up (whether upon chance-medley or not) are, that the force used must have been necessary, and that it must have been proportionate.

In other words, it must always appear that the mischief sought to be prevented could not, so far as the prisoner could tell at the time (*a*), have been prevented by some less violent means; and that the mischief done by, or which might reasonably be anticipated from, the force used was not out of proportion to the injury or mischief intended to be prevented (*b*).

Ford being in possession of a room at a tavern, several persons proceeded to turn him out; to which he refused to submit. They drew their swords upon him and his companions, and Ford then drawing his sword killed one of them. This was adjudged justifiable homicide, not as being in defence of his possession of the room, the disturbance whereof was merely matter of provocation, but as being in defence of his own person, upon the threat of immediate violence (*c*).

Mawgridge, upon words of anger, threw a bottle at Cope's head, and immediately drew his sword. Cope returned a bottle at Mawgridge's head; and this was pronounced lawful self-defence, not as an act of retaliation, but in view of the drawing of Mawgridge's sword, which showed that he intended to follow up the bottle-throwing by a more deadly attack (*d*).

Upon an indictment for manslaughter it was proved that the deceased was one of a party of six persons who had been drinking together and were proceeding along a road after midnight, when they met the prisoner, who stabbed the deceased with a knife in the arm-pit. There was discrepancy of evidence as to the conduct of the deceased and his friends previously to the inflicting of the wound. Vaughan, J. (Williams, J., being present), directed the jury as follows :—

(*a*) *R. v. Price*, Tayl., Princ., 900 (1846).

(*b*) Cr. Code Rep., p. 11, and note B.

(*c*) *Ford's Case*, Kel. 51; 1 East, P. C. 243.

(*d*) *Mawgridge's Case*, Kel. 121; 1 East, P. C. 243 (1706).

That it was not justifiable homicide, unless there was an intention on the part of the deceased and his companions to rob or murder the prisoner, or to do some dreadful bodily injury to him; and that it was not the law that a man would be justified in taking away the life of another, merely because he feared that he might be assaulted, or indeed if he were actually assaulted. The question for their consideration was, whether the conduct of the party made it *necessary* for the prisoner to inflict that blow which almost immediately terminated in the death of the deceased—whether he inflicted the wound in self-defence, to save his own life which was in danger, or to protect himself from some dreadful bodily injury.

The jury found the prisoner guilty, but recommended him to mercy, on the ground that he committed the act under the apprehension of personal danger; and he was sentenced to three years' hard labour (e).

In another case, where justification was pleaded in answer to a charge of wounding with intent to do grievous bodily harm, it was proved that the prosecutor, another man named Witby, and a woman, having been drinking together, met the prisoner on the highway at midnight. Some words passed, and Witby struck at the prisoner; the prisoner struck back with a knife, but the prosecutor intervening caught the blow on his arm. Crowder, J., held that the charge of wounding with intent to do grievous bodily harm to the prosecutor could not be sustained (f); but he might be convicted of unlawfully wounding. He directed the jury (who, however, acquitted the prisoner) that unless the prisoner apprehended robbery or some similar offence, or danger to life, or serious bodily danger—not simply being knocked down—he would not be justified in using the knife in self-defence (g).

There must be a reasonable proportion to the mischief threatened, not only in respect of the weapon used (h), but also in the time and method of its use (i).

“Vim vi repellere licet modo fiat moderamine inculpatæ tutelæ, non ad sumendam vindictam, sed ad propulsandam injuriam.” (k).

So, although a man is justified not only in preventing or repelling

(e) *R. v. Bull*, 9 C. & P. 22 (1839).

(f) *Sed vide R. v. Stopford*, 11 Cox, 643 (1870), *ante*, Chap. VII.

(g) *R. v. Hewlett*, 1 F. & F. 91 (1858).

(h) *R. v. Hewlett*, *supra*; *Osborn v. Veitch*, 1 F. & F. 317 (1858); *R. v. Forster*, 1 Lew. 187 (1825); cf. *R. v. Weston*, 14 Cox, 346 (1879).

(i) *Vide Meade's Case*, 1 Lew. 184 (1825).

(k) Co. Litt. 162 a.

an actual assault (*l*), but also in-doing what may be necessary to prevent its repetition (*m*), the force must not be used after the danger is over (*n*).

It is not reasonable that for every assault a man should be banged with a cudgel, and "if upon a little blow given by A. to B., B. gives him a blow that mayhems him, that is not *son assault demeſne*" (*o*); though the plea would have been good if a scuffle had intervened (*p*).

As regards the use of a deadly weapon, a great deal depends on the amount of deliberation shown by the prisoner in resorting to it, and his means of knowledge as to the degree of danger threatened against himself. In a recent case, where a man was convicted of unlawful wounding by using a razor upon the prosecutor, who had only attacked him with his fists, the Court of Criminal Appeal refused to interfere, because the prisoner had not casually picked up a razor lying near, but had taken the weapon out of his pocket:—

"That shows intention. He gave him, not one, but two cuts on the head, which were very dangerous. The case was quite properly left to the jury with the direction: 'Did he use more violence than was reasonably necessary to repel the attack?' " (*q*).

Self-defence is not limited to the warding off a blow; it may justify the "striking one,—a battery, in fact, in return for an assault which missed being a battery" (*r*).

"The difficulty arises in drawing the line between mere self-defence and fighting. The test is this: a man defending himself does not want to fight, and defends himself solely to avoid fighting. Then, supposing a man attacks me and I defend myself, not intending or desiring to fight, but still fighting—in one sense—to defend myself, and I knock him down and thereby unintentionally kill him, that killing is accidental" (*s*).

Another condition attaching to the plea of self-defence, in all cases except where the conduct ensues upon chance-medley, is that "in no

(*l*) 1 East, P. C. 286.

(*m*) Per Parke, B., Anon., 2 Lew. 48.

(*n*) *R. v. Driscoll*, C. & M. 214 (1841).

(*o*) Per Holt, C.J., *Cockroft v. Smith*, 2 Salk. 641; 1 Ld. Raym. 177 (1704).

(*p*) *Ib*.

(*q*) *R. v. Morse*, 4 Cr. A. R. 50 (1910).

(*r*) *R. v. Deana*, 2 Cr. A. R. 76 (1909), per Darling, J.; cf. Lib. Ass., ann. 43, f. 274, pl. 31 (1369); vide Ken., S. C. 141.

(*s*) *R. v. Knock*, 14 Cox, 1 (1877), per Lindley, J.

case can a man justify the killing of another under the pretence of necessity, unless he were wholly without any fault imputable by law in bringing that necessity upon himself" (t).

For example, where a number of persons forcibly ejected others from a house, and, three days after, in defence of the house against attempted recapture, killed one of the ejected party, they were all found guilty of manslaughter (u) by virtue of the doctrine of common purpose; there being sufficient provocation to reduce the guilt, by reason of the suddenness of the occasion, and the pretence of title (x), but those circumstances affording no excuse of self-defence on the part of any of them.

The questions arising in all cases of self-defence are, therefore—first, whether there was an adequate occasion for the use of violence; secondly, whether that occasion was a just occasion, or whether brought about by the defendant's own fault; and, thirdly, whether no more violence was used than was both necessary to prevent the mischief threatened, and proportionate to the gravity of such mischief (y).

If there was no adequate or just occasion for the violence, or more violence was used than was necessary and proportionate to the evil feared, the prisoner may be convicted of an assault (z), of wounding with intent (a), of murder (b), or of manslaughter (c), according to the nature and consequences of his act and the degree of his intentionality.

The using of excessive force upon a just occasion which warrants some violence is a very different thing from the use of force where there is no just occasion at all; for the existence of a just occasion for violent measures involves at least some amount of provocation, which may well reduce the guilt of the excessive violence from murder to manslaughter, or from felonious wounding "with intent" to the misdemeanour of unlawful wounding (d).

(t) 1 East, P. C. 277.

(u) *Case of Drayton Basset*, Hale, I., 440 (1580).

(x) Hale, I., 444.

(y) Vide *Cook v. Beale*, 1 Ld. Raym. 176 (1698).

(z) *R. v. Mabel*, 9 C. & P. 474 (1840).

(a) *R. v. Odgers*, 2 M. & R. 479 (1843).

(b) *R. v. Moir*, *ub. inf.* (1830).

(c) *R. v. Dakin*, *ub. sup.* (1828).

(d) Vide *infra*.

With regard to the defence of third persons, it has been laid down, in confirmation of the old authorities, that—

“ In the case of parent and child, if the parent has reason to believe that the life of a child is in imminent danger by reason of an assault by another person, and that the only possible, fair, and reasonable means of saving the child's life is by doing something which will cause the death of that person, the law excuses that act. It is the same of a child with regard to a parent; it is the same in the case of husband and wife ” (e).

An ancient decision, to the effect that, if a robber slays a merchant and the merchant's lad comes up in haste and kills the robber, there was no felony on the part of the lad (f), seems to have been grounded upon the fear which the lad might reasonably entertain for his own life (g). If he had come up earlier, however, and killed the robber in defence of his master whilst the latter was yet alive, he would have been justified under the principle of self-defence by virtue of service.

It was doubted by Dalton whether the servant's right to justify an assault in defence of his master was reciprocated by a like right of the master to defend his servant, and, it was added : “ neither can the farmer or tenant justify such an act in defence of his landlord, nor a citizen, etc., in defence of the mayor (or bailiffs) of the city or town corporate where he dwelleth (h). ”

There seems, therefore, good reason to doubt the correctness of a suggestion which has been made that our courts would now probably recognise a general duty, apart from any special relationship, on the part of the strong to protect the weak (i).

The right of self-defence has been too commonly considered as if it covered, not only the defence of a man's own person, or the repelling of an attack on a third party whom he is bound to protect, but also two other matters which are of an entirely different nature and scope, viz., the right of *self-assistance*, which justifies a man to a limited extent in the defence of his property, and in the assertion or maintenance of

(e) *R. v. Rose*, 15 Cox, 540 (1884); cf. *Handcock v. Baker*, 2 Bos. & P. 260 (1800).

(f) Lib. Ass., ann. 26, f. 123, pl. 23 (1353); vide Ken., S. C. 137-8.

(g) 1 Hawk. c. 23, s. 21; 1 East, P. C. 293.

(h) Dalt., c. 121; et vide 1 Hawk., c. 60, ss. 23-4.

(i) Kenny Oult. 154.

certain rights connected with property, and the excuse of *advancement of justice*, which justifies various acts done with the object, not of defending anybody or anything, but of securing either the prevention of a forcible and atrocious crime or the arrest or punishment of an offender.

Doubtless the three matters are frequently very much involved one with another. When a man shoots at a burglar or highway robber, he may be actuated by either of three motives: fear for his own life or the lives of others in his company, fear of losing his property by theft, or a zealous desire to secure the punishment of the criminal. It is not, however, conducive to clear reasoning that all three motives should be jumbled together under the heading of self-defence; they are much better considered separately, under the several headings of self-defence, self-assistance, and advancement of justice.

II. SELF-ASSISTANCE.

The law has always been slow to allow people to act as judges of their own cause; and it is very seldom that acts of violence, either to person or to property, can be justified merely on the ground that they were performed in the assertion or maintenance of real or supposed rights.

Most landlords, for instance, have a wholesome appreciation of the narrowness of those bounds of peace and propriety within which their extraordinary remedies of distress and re-entry can be safely exercised.

The abatement of a nuisance, or of an obstruction to a public or private easement, if not performed with the utmost care and circumspection, may easily become an unjustifiable act of aggression, or develop into a riot or some other punishable offence against person or property, whereby a would-be upholder of the law may find himself liable to conviction as an offender against it.

It is true that, in defence against such crimes as burglary and robbery, "the injured party may repel force by force, and is not obliged to retreat, but may pursue his adversary in order to secure himself from danger" (*k*).

But burglary brings a case within the principle of self-defence (*stricto sensu*) rather on account of the actual and apprehended violence accompanying a forcible entry than by reason of the apprehended loss of property. It involves extreme danger, not so much to a man's

(*k*) 1 East, P. C. 221.

property as to his person, for "his house is his castle of defence, and therefore he may justify assembling persons for the safeguard of his house" (l).

The same reasoning applies to a robbery committed or attempted on a man, "which cannot be without a taking from his person" (m).

So, in directing the jury upon an indictment for manslaughter, Kennedy, J., said:—

"With reference to the defence that the prisoner was acting in defence of his property, in my judgment, the infliction of death must be to prevent no ordinary crime; it must be a crime of a serious and also felonious nature. You must not shoot a trespasser merely because he is a trespasser. If he shows an intention to accomplish a *felonious* purpose *by force*, extreme measures may be used" (n).

The remedy of self-assistance against a trespass is limited, in the absence of violence on the trespasser's part (o) or some show of resistance (p), to ousting him by as gentle means as possible (q).

"A kick is not a justifiable mode of turning a man out of your house, though he be a trespasser" (r), and resort to such a remedy, if leading to fatal injuries, incurs the guilt of manslaughter (s).

If a trespasser will not go out, upon the request of the occupier, the latter "is justified in putting him out by force, and may call in his servants to assist him in so doing," or authorise a policeman to do so (t), but "although a person be in the house of another, and misconducting himself, the owner has no right to turn him out by force, without first requesting him to depart" (u).

In short, "a justification of a battery in defence of possession, though it arose in the defence of the possession, yet in the end it is the defence of the person" (x)—that is to say, it must have arisen out of some

(l) Hale, I., 487.

(m) Per Powell, J., *Green v. Goddard*, 2 Salk. 641; Ken. S. C. 147 (1704).

(n) *R. v. Symondson*, 60 J. P. 645 (1896); cf. *Waver v. Bush*, 8 T. R. 78 (1798).

(o) *Hinchcliffe's Case*, 1 Lev. 161 (1823).

(p) *R. v. Willoughby*, 1 East, P. C. 288 (1791); *Rossiter v. Conway*, 58 J. P. 350 (1894).

(q) Hale, I., 484-5.

(r) *R. v. Wild*, 2 Lew. 214 (1837), per Alderson, B.

(s) *Ib.*

(t) *Wheeler v. Whiting*, 9 C. & P. 262 (1840), per Patteson, J.

(u) *Ib.*

(x) 1 Rolle Abr., "Trespass," G. 8; cf. Hale, I., 484-5.

violence to the person, either actually committed or reasonably apprehended (y), and not out of the mere trespass alone.

In *R. v. Moir* (z) the prisoner, having ordered some fishermen not to trespass on his land, and finding the deceased and others crossing it, rode up to them and ordered them back. They refused to go, and angry words passed. There was some evidence that the deceased threatened to strike the prisoner with a pole. The prisoner shot him in the arm, and the wound proved fatal. Before the deceased was supposed to be in danger of death the prisoner avowed and justified his act, saying that in similar circumstances he would do the same again; that this land was his castle, and that as he could not without the use of fire-arms prevent the fishermen from persisting in their trespass, he did use them, and would use them again. However, he never had the chance of doing so, for upon his trial Lord Tenterden told the jury that the prevention of such a trespass could not justify such an act, and left to them, as the only possible justification, the question whether the prisoner was in reasonable apprehension of danger to his life from the threats of the deceased. Upon that direction the prisoner was convicted of murder and hanged.

"His fate is a warning to theorists who incline to the legal heresy that every right may lawfully be defended by the force necessary for its assertion" (a).

There seems, in fact, to be this distinction between cases of self-defence (in the strict sense) and other cases of self-assistance: that in the former the main consideration is the lawfulness of the occasion, and the necessity of committing acts of violence at all, whereas in the latter class of cases more importance attaches to the manner in which the right is exercised, or in other words to the proportion between the evil suffered or threatened and the steps taken to avoid the same.

When people are exchanging deadly blows, it is not often possible, even if it were desirable or just, to measure with any degree of precision the proportion between the acts of aggression and defence; as soon as there is clear evidence of a just occasion for violence, the law will view leniently any slight excess shown by the person attacked, or his com-

(y) *Meade's Case*, 1 Lew. 184 (1823); *Level's Case*, 1 East, P. C. 274-5 (1639); *R. v. Dennis*, 69 J. P. 256 (1905).

(z) 72 Ann. Reg. 314; Cr. Code Rep., p. 44 (1830).

(a) Dicey, 490.

panions, in defending themselves. But in assuming the responsibility of self-assistance against wrongs touching property only, or even slight wrongs against the person, it behoves the defendant to act with the utmost circumspection, not only as regards the existence or validity of the right which he claims, but also as regards the refraining from any excessive violence in exercising it.

In *R. v. Scully* (a) the prisoner, who had been set to watch his master's premises, shot and killed a thief on the garden wall, after the latter had called upon an accomplice to fire at the prisoner. He was acquitted of manslaughter, upon the following direction by Garrow, B. :—

“Any person set by his master to watch a garden or yard is not at all justified in shooting at, or injuring in any way, persons who may come into those premises, even in the night; and if he saw them go into his master's hen-roost, he would still not be justified in shooting them. He ought first to see if he could not take measures for their apprehension. But here, the life of the prisoner was threatened, and if he considered his life in actual danger, he was justified in shooting the deceased as he had done; but if, not considering his own life in danger, he rashly shot this man, who was only a trespasser, he would be guilty of manslaughter.”

It has already been observed that, where guilt or innocence turns upon the possession of a supposed right of any kind, depending upon mixed questions of law and fact, any mistake made *bonâ fide*, on reasonable grounds, as to the existence of such right will have the effect of bringing the case within the doctrine of *ignorantia facti* (b).

This observation clearly applies to the exercise of a supposed right of self-assistance; and the rule of law applicable to such cases appears to be that if the defendants, acting in the exercise of a right which they even mistakenly supposed themselves to possess, did no more damage than might be reasonably supposed to be necessary for the assertion or protection of that supposed right, they will be entitled to an acquittal (c).

Claim of right being a good defence under the Malicious Damage Act, 1861 (d), it was held, upon a case stated, in *Daniel v. Janes* (e)

(a) 1 C. & P. 319; 28 R. R. 780 (1824).

(b) *Ante*, Chap. II.

(c) *R. v. Clemens and Others, etc.*, *ante*, Chap. II.

(d) 24 & 25 Vict. c. 97, s. 52.

(e) 2 C. P. D. 351 (1877).

that the placing of poisoned flesh in a garden, for the purpose of destroying a dog which was in the habit of straying there, was not an offence under sect. 41 of that Act (f); and Lord Coleridge said that the section "points to a wicked crime, the unlawfully and maliciously killing or maiming the animals referred to, for the purpose of indulging a cruel disposition, and not to an act done under an impression, right or wrong, that the party is justified in protecting his premises from a trespass by such means, especially after notice given."

This case was followed with some reluctance in *Smith v. Williams* (g), but was again considered in *Miles v. Hutchings* (h), where the appellant, a gamekeeper, had been convicted under the same section of shooting a dog *damage feasant*. The case was referred back for a clearer statement of the facts, on the point as to whether the appellant *bonâ fide* believed that what he was doing was necessary for the protection of his master's property; and the general proposition laid down by Lord Coleridge was declared to be too wide:—

"It is in my judgment not enough that he should be under the impression, right or wrong, that he is justified in protecting his premises from trespass, or (as in the present case) his master's property from injury: if he knows that much less violent measures would attain his object, he is not justified in resorting to such means as killing or wounding the animal" (i).

III. SUDDEN PROVOCATION.

The only kind of provocation which can entirely justify a battery is such as gives rise to the right of self-defence; and "it is a common error to suppose that one person has a right to strike another who has struck him, in order to revenge himself" (k).

Provocation, as a separate ground of excuse for crime, arises only in cases of homicide and the few serious offences of wounding and inflicting personal injury which, as has been seen (l), are governed by the same

(f) *Sed vide* Poisoned Flesh Prohibition Act, 1864 (27 & 28 Vict. c. 115), s. 2.

(g) 9 T. L. R. 9 (1892); *sed vide* *Armstrong v. Mitchell*, 20 Cox, 497; 67 J. P. 329 (1903).

(h) 1903, 2 K. B. 714.

(i) *Per* Wills, J.

(k) *R. v. Driscoll*, C. & M. 214 (1841), *per* Coleridge, J.

(l) *Ante*, Chap. VII.

considerations with regard to *mens rea* as homicide. In these cases provocation is never more than a partial excuse, or indulgence, the effect of which is to reduce the prisoner's guilt from that of murder to that of manslaughter, or from the felony of inflicting grievous bodily harm with full intent to the misdemeanour of so doing without full intent of a grave consequence (*m*).

Strictly speaking, indeed, the provocation itself is never the ground even of a partial excuse or indulgence, but forms merely an occasion upon which such an excuse may arise; for it lies upon the prisoner not only to prove the sufficiency of the provocation offered to him, but further to show that its actual effect upon him was such as to deprive him, for the time being, of his power of self-control (*n*).

"The only ground for not applying the general rule is, that the defendant was in such a state that he could not remember or be influenced by the fear of punishment; if he could be, the ground of exception disappears" (*o*).

It follows from these considerations that provocation, in order to afford a partial defence in law, must be of a gross character.

In particular, it has been frequently laid down that provocation by words or gestures is quite insufficient (*p*), at any rate unless they amount to a great deal more than mere insult or annoyance, as by conveying information of some wrongful conduct, *e.g.*, where a wife taunts her husband by confessing adultery (*q*), or threatens to commit it (*r*).

The law on this subject was considered upon a recent application for leave to appeal against a conviction of murder. The applicant, while walking with his sweetheart, told her that he was going abroad; whereupon she said that, if he did so, she would "go on the town, as she had done before." Upon his asking whether she meant that, she answered "Yes"; and he then killed her with a razor, which he had

(*m*) Vide, *e.g.*, *R. v. Bourne*, 5 C. & P. 120 (1831).

(*n*) St. Dig., art. 246.

(*o*) Holmes, p. 62.

(*p*) *Brain's Case*, Hale, I., 455-6 (1600); *R. v. Frances*, 3 Mod. 68 (1685); *R. v. Taylor*, 5 Burr. 2793 (1771); *R. v. Noon*, 6 Cox, 137 (1852); et vide 1 East, P. C. 233.

(*q*) *R. v. Rothwell*, 12 Cox, 145 (1871).

(*r*) *Ib.*, *R. v. Jones*, 72 J. P. 215 (1908).

in his pocket, having bought it on the previous day. In delivering the judgment of the Court, refusing leave to appeal, Channell, J., said :—

“ Words alone, unless in very exceptional circumstances, are not sufficient provocation to reduce homicide from murder to manslaughter ; and the only exceptional circumstances sufficient to have that effect are cases relating to adultery. . . . In the present case, the applicant and the girl were not married, and whatever the relations between them had been, they were not even the relations, which unfortunately are not uncommon, of unmarried people living together as husband and wife. The applicant and the girl were engaged to be married, but their relationship was quite different from that in which the exception to the rule which I have referred to obtains ” (s).

Again, there can never be provocation by mere suspicion, *e.g.*, as to a wife’s unfaithfulness (t).

But, on the other hand, words or gestures may supplement a slight provocation by blows (u), or by spitting at a man (x), so as to magnify such acts into gross provocation. And there may well be gross provocation without any assault whatever, *e.g.*, by false imprisonment (y), or by whipping, violently or insolently, a horse upon which one is riding (z).

The provocation need not have been intentionally directed against the prisoner, so long as it was sufficiently outrageous in its natural effect upon him. It may therefore have consisted of some assault, offence or other act (whether openly committed or unexpectedly detected) upon a person nearly related to him by marriage, consanguinity or service, or upon some person in his company. For example, there is sufficient provocation where a man finds adultery being committed with his wife (a), or sees his daughter violently assaulted by her husband (b). But not where a man finds, in an intoxicated condition, and in a house of ill-repute, a woman with whom he is living but to whom he is not married (c).

(s) *R. v. Palmer*, 29 T. L. R. 349 (1913).

(t) *R. v. Kelly*, 2 C. & K. 814 (1847) ; *R. v. Birchall*, 29 T. L. R. 711.

(u) *R. v. Sherwood*, 1 C. & K. 556 (1844), per Pollock, C.B.

(x) *R. v. Smith*, 4 F. & F. 1066 (1866) ; *R. v. Mason*, 8 Cr. A. R. 121.

(y) *Buckner’s and Withers’s Cases*, 1 East, P. C. 233.

(z) *Lanure’s Case*, 1 East, P. C. 233 (1841).

(a) *Manning’s Case*, Hale, I., 485 (1672) ; *R. v. Maddy*, 1 Ventris, 158, Ken., S. C. 111 (1672) ; cf. *R. v. Fisher*, 8 C. & P. 182 (1837).

(b) *R. v. Harrington*, 10 Cox, 370 (1866).

(c) *R. v. Greening*, 29 T. L. R. 732 (1913) ; cf. *R. v. Palmer*, *supra*.

An apparently slight provocation may be shown, by evidence specially called upon the point, to have been in reality sufficiently gross to reduce the guilt of the crime charged. Thus, upon the indictment of a man for murdering his wife, he was convicted of manslaughter only, because it was proved that he suffered from some old abscesses about the neck, and that on the occasion in question he was afraid that his wife was about to twist his neckerchief, as she had several times done before, so as to make him black in the face (*d*).

In some instances, where under slight provocation a man has inflicted castigation, or done some similar act, which has proved fatal, but without using a deadly weapon (*e*), and without fully intending to kill, the slight provocation has been regarded as having the effect of reducing the offence from murder to manslaughter (*f*). In such cases, however, the slight provocation is of importance, not, like gross provocation, as an independent ground of excusability (*g*), but merely as evidence showing the absence of full homicidal intent (*h*); and the real ground of palliation must be that the blows given were not "such as were likely to be followed by death, or by a disease likely to terminate in death" (*i*). In other words, the manslaughter in such cases is not voluntary manslaughter at all.

So, it has recently been held that there could be no such excuse in a case where the death was the natural and direct consequence of the act complained of, viz., strangling by claspings the deceased's throat. "It is not the same as if the act had been a push which unexpectedly caused a fatal fall" (*k*).

The concession made by the law to human frailty does not protect acts of barbarity, e.g., tying a boy to a horse's tail (*l*), and the same rule applies as in self-defence, that the prisoner's acts must bear a reasonable proportion to the provocation given (*m*); but there is

(*d*) *R. v. Hopkins*, 10 Cox, 229 (1865).

(*e*) *R. v. Howlett*, 7 C. & P. 274 (1835); cf. *Fost.* 291.

(*f*) *Fray's Case*, etc., 1 East, P. C. 236 (1785).

(*g*) *R. v. Reason and Tranter*, 1 Str. 499, 1 East, P. C. 235, 320-1; 16 St. Tr. 1 (1722).

(*h*) 1 East, P. C. 235; *Rowley's Case*, 12 Rep. 87; *Fost.* 294-5 (1612).

(*i*) *R. v. Freeman*, Russ. 697 (1814).

(*k*) *R. v. Philpot*, 7 Cr. A. R. 140 (1912), per Lord Alverstone, C.J., at p. 142.

(*l*) *Halloway's Case*, Cro. Car. 131; *Fost.* 292 (1628); vide 1 East, P. C. 234-5.

(*m*) *Goffe's Case*, 1 Vent. 216 (1672); *Keate's Case*, Comb. 406 (1697); *R. v. Thorpe*, 1 Lew. 171 (1829); *R. v. Moir*, *ub. sup.*

naturally not the same strictness in applying this rule as in the case of self-defence, and where there is anything like room for two opinions as to the barbarous or reasonable nature of the act the case will usually be left to the jury as open to decision either way (*n*).

Besides being gross, provocation must be sudden; it mitigates the guilt only of a *furor brevis* which for the time being renders a man deaf to the voice of reason (*o*), and it must cause a strong resentment at the instant of the crime committed (*p*).

The plea therefore does not avail where there was premeditation or prior ill-will against the deceased (*q*), such as to disprove sudden intention, or where the provocation was sought (*r*) or provoked by the prisoner (*s*), or where there was pre-arrangement, as in a duel (*t*).

Too little attention seems to have been given to the question of premeditation, in a recent trial at the Old Bailey, where a negress was indicted for the murder of a white woman with whom her husband was living, and of whom she was undoubtedly jealous. The prisoner had admittedly bought a revolver and cartridges before calling on her husband and the deceased; but her own account of the crime was that she shot the deceased in mistake for her husband, who had struck her. The jury were directed to the following effect by Darling, J., who, however, when the jury brought in a verdict of manslaughter, expressed his dissent :—

“ If a person feloniously fires at another in such circumstances as would make the killing of that other person murder, but by accident hits and kills a third person whom he never intended to kill at all, that is murder. That has been laid down over and over again; there is plenty of authority for it. It seems to me that, by parity of reasoning, if the firing at the person intended to be hit would be manslaughter, then, if the bullet strikes a third person who is not intended to be hit, the killing of that person equally would be manslaughter, and not murder. The reason of its being possible that the killing of Jessie Mackintosh may mean something less than murder is this. If the husband had been killed

(*n*) *R. v. Eagle*, 2 F. & F. 827 (1861).

(*o*) Vide *Stedman's Case*, Fost. 292, 1 East, P. C. 234 (1704).

(*p*) Fost. 315.

(*q*) 1 East, P. C. 232; *Mason's Case*, Fost. 132 (1756); *R. v. Kirkham*, 8 C. & P. 117 (1837), per Coleridge, J.

(*r*) *Mason's Case*, *ub. sup.*; Hale, I., 456; 1 Hawk., c. 31, s. 24.

(*s*) *R. v. Thomas*, 7 C. & P. 817 (1837); *R. v. Selten*, 11 Cox, 674 (1871).

(*t*) *R. v. Young*, 8 C. & P. 644 (1838); et vide *R. v. Cuddy*, 1 C. & K. 210 (1843).

owing to the provocation which it is said was given by blows, I shall have to tell you that, if you believe that the effect of those blows being given and the provocation following upon them was such as for the time to upset the ordinary balance of the prisoner's mind, the law has long allowed that such provocation as that may reduce the crime from murder to manslaughter, and, therefore, the provocation operating on the mind of the prisoner reduces the killing to manslaughter. It would equally be manslaughter, whether the person who gave the provocation was killed, or whether some other person was killed. The reason of the distinction is that the ordinary balance of mind of the prisoner was so upset that, as has often been said, the law, in leniency and in mercy, does not hold the person to the full consequences of the act which he or she in such circumstances commits. Therefore, if you believe the prisoner's story as to the blows, and find that they were given by Henry Gross in such circumstances as would have reduced the crime to manslaughter had he been killed, the crime will equally be manslaughter, not murder, though it was not the man who was killed but the woman, who was hit by accident, according to the story" (u).

Again, provocation affords no excuse where there is a sufficient interval between the provocation and the homicidal act for the passion to cool (x), or where the killing is of a cold-blooded or methodical description, *e.g.*, putting a rope round a man's neck and strangling him (y).

The provocation must have been unjustified, *i.e.*, not induced or rendered reasonable by prior acts on the part of the prisoner (z), and in this respect again it resembles, as has been seen, the excuse of self-defence.

The partial excuse of provocation does not apply to homicides committed in resistance to the ministers of justice (a), such as bailiffs, police officers and special constables, who are under the peculiar protection of the law, *eundo morando et redeundo*, for the purposes of their duty, whether in the prevention of crime or in the execution of civil or

(u) *R. v. Gross*, 77 L. J. N. 40 (1913).

(x) *R. v. Lynch*, 5 C. & P. 324 (1832), per Lord Tenterden, C.J.; *Mason's Case*, *ub. sup.* (1756); Post. 296; 1 East, P. C. 251; *R. v. Willoughby*, 1 East, P. C. 288 (1791); *Oneby's Case*, *ib.* 253 (1726); *Bromwich's Case*, *ib.* 255 (1666); *R. v. Hayward*, 6 C. & P. 157 (1833); *R. v. Fisher*, *ub. sup.*; *R. v. Albis*, 9 Cr. A. R. 158.

(y) *R. v. Shaw*, 6 C. & P. 372 (1834); cf. 1 East, P. C. 252.

(z) *R. v. Bourne*, 5 C. & P. 120 (1831); *sed vide infra*, as to mutual combat.

(a) 1 East, P. C. 295.

criminal process. Killing them, whilst under that special protection, is therefore in all cases murder, provided that the prisoner had sufficient notice of their authority (b), and provided their conduct was in every respect regular (c).

IV. PROVOCATION BY COMBAT.

Many difficulties are inherent to cases of mutual fighting and struggling, where in the course of a trial it is often necessary to consider such diverse matters as the degree of homicidal intention evinced on either side, ignorance of fact, drunkenness, the nature, degree and effect of mutual provocation, the measure of reprisals, premeditation or deliberation, the scope of acts done in self-defence, and the effect on the passions and fears of both parties of the giving of blow for blow.

Such cases are often further complicated by the intervention of third parties, with the object of stopping, encouraging or aiding the combatants; and all of these matters are usually capable only of the most imperfect proof, by reason of the quick succession of events, and the excitement of the occasion.

It is therefore not surprising to find that in cases of sudden and unpremeditated affrays, even with deadly weapons, where the fighting is not only mutual, but also on fair and equal terms (or at least with no undue advantage taken on the prisoner's part) the law makes no attempt to apply the rigid rules governing all other cases of provocation, but on the contrary treats the commencement of the affray as *causa remota*, and confines its attention to *causa proxima*, viz., the fighting itself, which, though perhaps unjustifiable in its origin, may in its course afford sufficient provocation to reduce an act of homicide from murder to manslaughter (d).

Upon this principle, the law applies to cases of mutual conflict two or three broad rules, in assessing the degree of provocation suffered, and in admitting it as a partial excuse (e).

The fighting must be sudden, unpremeditated, and in hot blood (f).

(b) *R. v. Porter*, 9 C. & P. 778 (1841); *R. v. Phelps*, C. & M. 180 (1841); *R. v. Porter*, 12 Cox, 444 (1873); *Sissinghurst House Case*, etc., etc.; Russ. Bk. IV. Chap. 1, s. 8.

(c) *R. v. Stevenson*, 19 St. Tr. 846 (1759).

(d) St. Dig., art. 224; *R. v. Brown*, 1 Leach, 148, Ken., S. C. 112 (1776).

(e) *R. v. Caniff*, 9 C. & P. 359 (1840).

(f) *Taverner's Case*, 1 Roll. Rep. 360 (1617); Hale, I., 452-3; Fost. 138, 296.

c It must be on equal terms, "no undue advantage being taken or sought on either side" (g), and "the party assaulted must be put upon an equal footing in point of a defence, at least, at the onset. This is peculiarly requisite when the attack is made with deadly or dangerous weapons" (h).

The taking of an unfair advantage by sudden impulse in the course of the quarrel appears not to matter, so long as it was unpremeditated; as in the case of the French prisoners, where the fatal stamping on the deceased's belly as he lay on the ground was held by the judges to be no more than manslaughter (i).

There is a like indulgence for the sudden impulsive or defensive use of a weapon in the course of the affray, unless placed ready to hand by the prisoner on purpose, or privately used by him from the beginning of the fight (k).

Even where, after a mutual struggling between father and son was over, the father stabbed the son mortally, the question of murder or manslaughter was left by Coleridge, J., as an open one for decision by the jury, who found it manslaughter (l).

The passionate behaviour of the prisoner after delivering the mortal stroke, e.g., in dashing the deceased's head on the ground and saying "Damn you, you are dead," does not increase the guilt in point of law (m). Such behaviour, however shocking, would indeed seem to show that loss of control which is of the essence of the plea of provocation.

Except in cases of self-defence (n), it matters not on whose side the merits of the quarrel lay at the time it started, nor who gave the first blow (o); for "the second blow makes the affray" (p). This is, however, a difficult rule to follow, when the merits of the quarrel are very

(g) 1 East, P. C. 241.

(h) *Ib.* 242; cf. *Fost.* 295; 1 Hawk., c. 31, ss. 27-8.

(i) *R. v. Ayes*, R. & R. 167 (1810), *sed quere*.

(k) *R. v. Anderson*, Russ. 715 (1816); *R. v. Taylor*, 5 Burr. 2793 (1771); *Snow's Case*, 1 Leach, 151 (1776); *R. v. Kessell*, 1 C. & P. 437 (1824); *Whitely's Case*, 1 Lew. 173 (1829).

(l) *R. v. Kirkham*, 2 F. & F. 115 (1837).

(m) *R. v. Walters*, 12 St. Tr. 113 (1688).

(n) *Vide supra*.

(o) Hale, I., 456; *Fost.* 295.

(p) Hale, I., 455.

heavily on one side ; and in such a case slight indications of premeditation may be sufficient to render the plea of provocation unavailing (g).

Where the resistance of the deceased consisted of no more than self-defence, there is no affray which can give rise to the excuse of provocation ; for the law recognises the old proverb that it takes two to make a quarrel. Thus, “ if one without provocation draw his sword upon another, and the second draw, they fight, and after mutual passes the second is killed, it is murder ” (r).

Provocation offered to a person by an assault or by combat may constitute provocation to other persons present, but “ it is uncertain how far this principle extends ” (s).

On the principle of “ advancement of justice ” (t) there is a plain justification for interference between combatants where such interference is intended solely to restore peace between them and is confined to the necessities of the case :—

“ Even private persons are bound to prevent a felony being committed by all possible lawful means, without exposing their own lives ; though if their zeal carry them thus far, the law will not put them in a worse situation on that account ” (u).

But if the interference be to aid the one party or the other, and have a fatal consequence, it cannot be less (x), and apparently will not usually amount to more (y) than manslaughter. It certainly will not be entirely innocent, in the absence of some excuse of close relationship, friendship or service giving the person intervening “ a prior interest in the safety of the person for whose sake they interfere ” (z), and it may well be doubted whether such considerations as those last mentioned, or the circumstance of a stranger having “ happened to be privy to the whole cause and progress of the dispute ” (a) would now be allowed as a complete

(g) Vide *Oneby's Case*, 1 East, P. C. 253 (1726) ; cf. *R. v. Lord Byron*, 19 St. Tr. 1177 (1765).

(r) Per Holt, C.J., *Tooley's Case*, 11 Mod. 251 (1710).

(s) St. Dig., art. 247, et vide note IX.

(t) *Infra*.

(u) 1 East, P. C. 290.

(x) *Ib*.

(y) 1 East, P. C. 291.

(z) 1 East, P. C. 290.

(a) *Ib*.

justification for taking sides in a deadly affray, especially in the absence of any settled distinctions even under the older authorities (b).

V. ADVANCEMENT OF JUSTICE.

The principle of advancement of justice should be understood as covering not only acts done in the prevention or repression of crime, and the arrest and prosecution of offenders, but also the execution of judicial sentences; because the advancement of justice cannot be said to be complete until satisfaction has been made for any crime actually committed.

As thus considered, the principle applies to a large variety of acts done in furtherance or execution of the law, usually by public officers in the execution of their peculiar duties, but on some occasions by private individuals, in pursuance of that general duty which binds every citizen not only to prevent the commission of crime, but also to secure its due punishment by all lawful means (c).

It is impossible in the present place to give an exhaustive or detailed exposition of the law on this subject; nor indeed does the excuse of advancement of justice give rise to any important considerations of general interest. Such an excuse rarely arises in respect of acts done by private persons; and when it does arise, or is put forward on their behalf, its limitations do not often form the subject of argument; any dispute in such cases usually turns upon the facts and evidence, rather than upon the law applicable thereto.

The chief occasions upon which the advancement of justice has been recognised as affording a valid excuse for acts of personal violence, which would otherwise be punishable on indictment, are as follows:—

(1) Where the act is, or appears to be, necessary for the prevention of a forcible and atrocious crime, or the suppression of a general and dangerous riot (d).

(b) 1 Hawk., c. 31, s. 60; Fost. 312; 1 East, P. C. 292, 325; *Ferrers's Case*, Cro. Car. 371 (1634); *Hugget's Case*, Kel. 59 (1666); *Tooley's Case*, 2 Ad. Raym. 1296 (1710); *R. v. Adey*, 1 Leach, 206 (1779); *R. v. Osmer*, 5 East, 304 (1804); *R. v. Warner*, 1 Moo. 380, per Alderson B., at p. 385 (1833); *R. v. Phelps*, C. & M. 180 (1841); *R. v. Davis*, L. & C. 64, per Pollock, C.B., at p. 71 (1861); *R. v. Allen and Others*, 17 L. T. N. S. 222, St. Dig. App., note IX. (1867), etc., etc.

(c) 1 East, P. C. 290, *supra*.

(d) 1 East, P. C. 257, 297; *R. v. Pinney*, 5 C. & P. 254, per Tindal, C.J. (1832);

(2) Where the act is, or appears to be, necessary for the suppression of a breach of the peace, and the degree of violence used is not excessive for that purpose (e); *e.g.*, where a by-stander intervenes between combatants, giving due notice to them of his friendly intention merely to part them (f).

(3) Arrests by officers and others, and the prevention of escapes and rescues; according to the minute distinctions drawn in the old books of authority, and established by numerous decisions, as to the offences in respect of which warrants are or are not necessary, and as to various other conditions of justification (g).

(4) The strict execution of the lawful, or apparently lawful, sentence or process of any competent Court (h).

The older authorities are extremely confused upon all these matters; and the whole subject of excuse by reason of the advancement of justice is found frequently to have been wrongly considered as identified with excuse by self-defence; from which it is properly distinct (i).

There is a clear distinction between the defence of one's own person and property, or the defence of other persons or property under the obligation of close relationship or service, on the one hand, and the prevention or repression of crime, on the other. Yet it was laid down by Lord Hale that—

“If A. be travelling, and B. comes to rob him, and C. falls into the company, he may kill B. in defence of A. . . . for in such case of a felony attempted, as well as of a felony committed, every man is thus far an officer, that at least his killing of the attempter in case of necessity puts him in the condition of *se defendendo* in defending his neighbour” (k).

Keighly v. Bell, 4 F. & F. 763, per Willes, J. (1865); *Phillips v. Eyre*, L. R. 6 Q. B. 1 (1870); *St. Dig.*, arts. 219, 220; *Cr. Code*, ss. 49—53.

(e) *R. v. Osmer*, 5 East, 304 (1804); *Timothy v. Simpson*, 1 C. M. & R. 757 (1835); *Cr. Code*, s. 48.

(f) *Fost.* 272.

(g) *Hale*, I., 489-490, 494; *Fost.* 270-2; 1 *East*, P. C. 298; *R. v. Allen and Others*, 17 F. T. N. S. 222; *St. Dig.*, App., note IX. (1867); *Cr. Code*, ss. 27—47; *Ken.*, S. C. 142-3.

(h) *Hale*, I., 497; *Fost.* 267; 1 *East*, P. C. 332-4; *St. Dig.*, art. 218; *Cr. Code*, ss. 25-6, 28-9.

(i) Vide *R. v. Forster*, 1 *Lew.* 187 (1825).

(k) *Hale*, I., 484; cf. *St. Dig.*, art. 221 (c), note; *Kenny*, Outl., 154; *Dicey*, App., note IV., pp. 493-4.

Some attempts have been made, though with no great success, to extend the plea of advancement of justice into the wider and more vague excuse of public policy.

"With respect to the argument of state necessity, or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions" (l).

But the principle *salus populi suprema lex* has been seriously urged as an excuse for crime in at least one important case, where it was pleaded under the designation of "civil necessity" (m). The defendants were convicted upon an information in the King's Bench, of having forcibly deposed and imprisoned Lord Pigot, who as Governor of Madras, had acted in an arbitrary manner, misusing his power as President of the Council, and securing a majority of the Council in his favour by illegally ejecting two members who resisted his proposals. In the course of his summing-up to the jury, Lord Mansfield, after adverting to what Lord Pigot had done, said :—

"It seems as much laying aside their power as Cromwell did that of the House of Commons, when he turned them out of doors.

"But the main question then remains: supposing this to be true, will it afford a justification to the defendants? . . . They had no legal authority, that is certain. Why, they say, it was upon necessity; and to be sure, whenever necessity forces a man to do an illegal act—*forces* him to do it—it justifies him, because no man can be guilty of a crime without the will and intention of his mind. . . . A man who is absolutely by natural necessity forced, his will does not go along with the act; and therefore in the case of natural necessity . . . if a man be forced to commit acts of high treason, if it appears really force, and such as human nature could not be expected to resist, and the jury are of that opinion, the man is not then guilty of high treason. In a case of homicide, if a man was attacked, and in danger, and so on in a variety of instances, natural necessity certainly justifies; but this is not a case of natural necessity; Lord Pigot was not going to kill any of those men, nor attack them either in his private capacity or as Governor or magistrate with his Council; and therefore it must be what is called a civil or state necessity.

(l) *Entick v. Carrington*, 19 St. Tr. 1029, per Lord Camden, C.J., at col. 1073 (1765).

(m) *R. v. Stratton and Others*, 21 St. Tr. 1045 (1779); cf. *Burrows v. Rhodes*, 1899, 1 Q. B. 816.

"Now, as to natural necessity, the instances I alluded to are all adjudged cases and authorities.

"As to civil necessity, none can happen in corporations, societies and bodies of men deriving their authority under the Crown, and therefore subordinate; no case ever did exist in England, no case ever can exist; because there is a regular government to which they can apply; they have a superior at hand; and therefore I cannot be warranted to put you any case of civil necessity that justifies illegal acts, because the case not existing nor being supposed to exist, there is no authority in the law books, nor any adjudged case upon it. Imagination may suggest, you may suggest so extraordinary a case as would justify a man by force overturning a magistrate and beginning a new government, all by force; I mean in India, where there is no superior nigh them to apply to; in England it cannot happen; but in India you may suppose a possible case; but in that case it must be imminent, extreme necessity; there must be no other remedy to apply to for redress; it must be very imminent, it must be very extreme, and in the whole they do they must appear clearly to do it with a view of preserving the society and themselves—with a view of preserving the whole.

"But in the case here, where is that imminent extreme necessity? But that I leave to you as judges of it. For, as in natural necessity, so in the other, the jury are to judge, if a case exists, or if you think this a case existing of that nature. What immense mischief would have arisen, to have waited for the interposition of the Council at Bengal, or even to have waited for the directions of the East India Company here? . . .

"If the Governor does twenty illegal acts, that will not be a justification of it; it must tend to the dissolution of society, and the intervention must tend to the preservation of it. . . .

"It is necessary for you to be satisfied, this is such a necessity to preserve the settlement of Madras to the Company and to the English Crown, as is analogous to the natural necessity I have been speaking of" (n).

This important judgment cannot be regarded as giving any considerable measure of support to Sir J. F. Stephen's theory of a general excuse of "necessity," for which he quotes it as the principal authority (o).

Elsewhere, that learned writer himself pointed out the danger of recognising any such overriding principle or excuse of expediency. Commenting upon Lord Mansfield's judgment (but ignoring the passages

(n) 21 St. Tr. at cols. 1223 et seq.

(o) St. Dig., art. 32; *ante*, Chap. XI.

which deny the possibility of any such excuse for acts committed within the limits of civilised government), he wrote :—

“ In short, it is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it, but these cases cannot be defined beforehand, and must be adjudicated upon by a jury afterwards, the jury not being themselves under the pressure of the motives which influenced the alleged offenders. I see no good in trying to make the law more definite than this ; and there would, I think, be danger in attempting to do so. There is no fear that people will be too ready to obey the ordinary law. There is great fear that they would be too ready to avail themselves of exceptions which they might suppose to apply to their circumstances ” (p).

Whatever reason there may have been in the eighteenth century for supposing “ civil necessity ” to be a conceivable excuse for crime committed at the other end of the world, better authority could hardly be desired than Lord Mansfield’s judgment for the proposition that there is no such excuse in the law of England for crimes or offences of any description committed in this country, or in any of our civilised colonies.

If ever civil or state necessity is again raised as a defence for crime, it will probably meet with as little judicial sympathy as cannibalism did in *R. v. Dudley and Stephens* (q).

In the meantime, one may entertain the simple faith that law is law, that *salus populi* is no excuse for breaking it, and that there is no room for public policy as an excuse for high treason or any other crime, except in an Act of Indemnity, or in a petition for the Royal clemency, after conviction (r).

Again, the excuse of advancement of justice has, in recent years, been paradoxically set up in supposed justification of acts amounting to obstruction of the police in the execution of their duty, and done with the sole object, not of preventing or punishing, but of facilitating, criminal offences, by regulating their commission in such a way as to render their detection or punishment more difficult.

(p) St. Hist., II., 109-10.

(q) *Ante*, Chap. XI.

(r) Cf. Dicey, Chaps. 4, 5, and 7 and App., note X., pp. 551-5 ; cf. Pollock, art

Such a case was *Betts v. Stevens* (s), where police constables were on duty observing and timing the speed of motor cars on a measured piece of road, with a view to the prosecution of those drivers found to be exceeding the legal speed limit. The defendant, who was a "sergeant of patrols" in the employ of the Automobile Association, warned approaching cars which were being driven at an illegal speed, and the drivers thereupon slackened speed, whereby the constables were prevented from obtaining such evidence as would have sufficed to prove an offence on the part of the drivers. Upon a case stated, the defendant was held to have been rightly convicted of wilfully obstructing the constables in the execution of their duty (t), and Darling, J., said :—

"The case finds that a continuous unlawful act was in course of being committed by various people, inasmuch as those people were driving motor cars faster than is lawful under the statute regulating such driving. The policeman Pyke was endeavouring to collect evidence of what was the pace of the cars before the measured distance was entered on, by ascertaining what was the pace of the cars within the measured distance. The appellant in effect advised the drivers of those cars which were proceeding at an unlawful speed not to go on committing an unlawful act. If that advice were given simply with a view to prevent the continuance of the unlawful act and procure observance of the law, I should say that there would not be an obstruction of the police in the execution of their duty of collecting evidence beyond the point at which the appellant intervened. The gist of the offence to my mind lies in the intention with which the thing is done. In my judgment in *Bastable v. Little* (u) I used these words: 'In my opinion it is quite easy to distinguish the cases where a warning is given with the object of preventing the commission of a crime from the cases in which the crime is being committed and the warning is given in order that the commission of the crime may be suspended while there is danger of detection.' I desire to repeat those words. Here I think it is perfectly plain upon the facts found by the magistrates in this case that the object of *Betts'* intervention was that the offence which was being committed should be suspended or desisted from merely whilst there was danger of the police detecting it and taking evidence of it, and that therefore he was obstructing the police in their duty to collect evidence of an offence which had been committed and was being committed. He did that wilfully in order to obstruct them in their duty, and not

(s) 1910, 1 K. B. 1.

(t) Prevention of Crimes Amendment Act, 1885 (48 & 49 Vict. c. 75), s. 2.

(u) 1907, 1 K. B. 59.

in order to assist them in the performance of their duty, nor in order to prevent a motorist upon the road from committing an offence."

An extreme application of the excuse of advancement of justice is to be found in the doctrine of martial law, as applicable to the justification of necessary acts of violence in this country during periods of warfare or civil commotion, and as excluding for the time being, *vel flagrante vel nondum cessante bello* (x), the normal jurisdiction of the civil Courts to call in question the propriety of any action on the part of the military authorities.

Martial law is to be distinguished from military law, which is a code of law for military persons, depending for its authority upon special legislation (y), and so forming part of the ordinary law of the land.

The only kind of martial law, in the proper sense of the term, recognised by our jurisprudence consists in a power conferred, and a duty imposed, not only on the military and other servants of the Crown, but also on every loyal citizen, according to his station and opportunity, to maintain the King's peace, at whatever cost of blood or property it may be strictly necessary to sacrifice for that purpose (z).

In the event of invasion, a defending army, acting under the authority of the Crown, may lawfully not only interfere with rights of property (a), but also interfere with the liberty, and even cause the death, of British subjects, in the course of such military operations as may be necessary (b).

Such instances are no more than applications of the same excuse which justifies acts of violence in times of peace, for the suppression of riots and internal disorders (c).

"Nor is it irrelevant at this point to note the striking analogy between the right of an individual to exercise force, even to the extent of causing death, in self-defence, and the right of a general or other loyal citizen to exercise any force whatever necessary for the defence of the realm.

(x) *Elphinstone v. Bedreechand*, 1 Knapp, 316; *Ex parte Marais*, 1902, A. C. 109, 115.

(y) Mutiny Act (1 Will. & M. c. 5); Army Acts, 1881 to 1907; Army (Annual) Acts, etc.; Dicey, Chap. 9.

(z) Dicey, p. 286 and App., note X.; *Wolfe Tone's Case*, 27 St. Tr. 615^a (1798); St. Hist., II., 207—216.

(a) *Case of Ship Money*, 3 St. Tr. 825, 906, 975 (1638); *British Cast Plate Manufacturers v. Meredith*, 4 T. R. 794 (1792)

(b) Dicey, p. 540.

(c) Dicey, pp. 543-4.

In either case the right arises from necessity. An individual may use an amount of force necessary to avert death or grievous bodily harm at the hands of a wrong-doer, but if he kills a ruffian he must, to justify his conduct, show the necessity of the force employed in self-protection. So a general, who under martial law imprisons or kills British subjects in England, must, if he is to escape punishment, justify his conduct by proving its necessity. The analogy between the two cases is not absolutely complete, but it is suggestive and full of instruction. . . .

"In every case in which the legal right or duty arises to maintain the King's peace by the use of force, there will be found to exist two common features. The legal right, *e.g.*, of a general or of a mayor, to override the ordinary law of the land is, in the first place, always correlative to his legal duty to do so. Such legal right or duty, in the second place, always lasts so long, and so long only, as the circumstances exist which necessitate the use of force. Martial law exists only during time of war; the right of a mayor to use force in putting an end to a riot ceases when order is restored, just as it only begins when a breach of the peace is threatened or has actually taken place. The justification and the source of the exercise in England of extraordinary or, as it may be termed, extra-legal power, is always the necessity for the preservation or restoration of the King's peace" (*d*).

VI. PREROGATIVE AND PRIVILEGE.

The minutiae of prerogative, privilege, and public status properly form a separate chapter of jurisprudence, and can hardly be fully treated in an incidental manner as falling within the exposition of general rules of imputability.

It is, for example, a somewhat unsatisfactory arrangement to set out the whole law concerning the authority of police officers, and the procedure of arrests, as if it formed merely part of the law of homicide (*e*). So, also, such important matters as martial law and the right of public meeting, though incidentally touching upon questions of imputability, can hardly be dealt with fully in such a chapter as the present; they are more conveniently regarded as forming part of constitutional law (*f*).

The present chapter would, however, be incomplete without some reference to a few of the more striking instances in which the Royal prerogative and the privileged status of public officials and others

(*d*) *Ib.*; cf. *St. Hist.*, II., 215-6; et vide *R. v. Eyre*, Finl.; *R. v. Nelson*, Cockb. (1866).

(*e*) *Russ.*, pp. 723-755.

(*f*) Cf. *Dicey*, p. 280.

have been held or alleged to confer a peculiar exemption from ordinary criminal liability; and indeed the rare occurrence of such instances in our legal system affords additional emphasis to what has already been said as to the wide application of the general rules of imputability discussed in previous chapters, and especially that rule which refuses to recognise the command of a master as affording any excuse for the unlawful act of a servant or inferior person (*g*).

Rex non potest peccare (*h*) is a maxim the discussion of which need not detain us long. The doctrine of the personal immunity of the reigning Sovereign is so familiar to all English people that the only danger of misunderstanding with regard to it is lest it should be considered a necessary part of the Constitution, whereas it is in fact of hardly more than accidental growth.

Although in our so-called limited monarchy the King "is in fact free from the fetters of positive law, he is not incapable of legal obligation. A law of the sovereign parliament, made with his own assent, might render himself and his successors legally responsible" (*i*), and the fact that he continues to be immune is perhaps chiefly attributable to the obedience which he habitually yields *ex gratia* to the laws for the time being in force and binding upon his subjects (*k*).

" 'The King can do no wrong.' This maxim, as now interpreted by the Courts, means, in the first place, that by no proceeding known to the law can the King be made personally responsible for any act done by him: if (to give an absurd example) the King were himself to shoot (*l*) the Premier through the head, no Court in England could take cognizance of the act. The maxim means, in the second place, that no one can plead the orders of the Crown or indeed of any superior officer in defence of any act not otherwise justifiable by law; this principle in both its applications is (be it noted) a law, and a law of the Constitution, but it is not a written law. 'There is no power in the Crown to dispense with the obligation to obey a law'; this negation or abolition of the dispensing power now depends upon the Bill of Rights; it is a law of the Constitution, and a written law. 'Some per-

(*g*) *R. v. James*, 8 C. & P. 131 (1837), etc.; *ante*, Chap. X.

(*h*) 2 Rolle, R. 304; Jenk. Cent. 203; Hale, I., 43-4, 127; *Howard v. Gosset*, 10 Q. B. 386, per Coleridge, J.

(*i*) Aust. 272.

(*k*) *Ib.*

(*l*) Cf. 4 St. Tr. 1034.

son is legally responsible for every act done by the Crown.' This responsibility of Ministers appears in foreign countries as a formal part of the Constitution ; in England, it results from the combined action of several legal principles, namely, first, the maxim that the King can do no wrong ; secondly, the refusal of the Courts to recognise any act as done by the Crown which is not done in a particular form, a form in general involving the affixing of a particular seal by a Minister, or the counter-signature or something equivalent to the counter-signature of a Minister ; thirdly, the principle that the Minister who affixes a particular seal, or counter-signs his signature, is responsible for the act which he, so to speak, endorses " (m).

This familiar but often misunderstood maxim is, therefore, to be taken as signifying, not that crimes may be safely or with impunity committed under the authority of the Crown, but, on the contrary, that the plea of Royal prerogative shall avail no person, great or small, except the Sovereign himself, whose personal freedom from punishment may properly be classified as " a mere matter of adjective law " (n).

This is the plain meaning of the more instructive maxim concerning the Royal power and immunity from the law : "*Rex non debet esse sub homine, sed sub Deo et sub lege, quia lex facit Regem*" (o).

" By the attribute *sovereignty* or *pre-eminence*, and *perfection*, we are not to understand that the King is above the laws, in the unconfined sense of those words, and that everything he does is lawful ; but that His Majesty, individually and personally, and in his natural capacity, is independent, and is not amenable to any other earthly power or jurisdiction. . . . As the law provides no redress against the Sovereign, it properly attaches the blame of illicit proceedings to those only who are within the reach of punishment ; for it would be absurd to suppose legal culpability which is dispunishable. . . . It is a fundamental general rule, that the King cannot sanction any act forbidden by law ; it is in that point of view that His Majesty is under, and not above, the laws ; that he is bound by them equally with his subjects " (p).

In short, the general principle that every man is criminally responsible for his own criminal acts, and cannot plead obedience to another man's commands in justification or excuse thereof, receives nowhere a more striking application than to the conduct of Crown servants :—

" The Warrant of no man, not even of the King himself, can excuse

(m) Dicey, pp. 24-5 ; cf. Hearn, Chap. 4.

(n) Kenny, Outl., 78.

(o) Bract., I., 5 ; 12 Rep. 65.

(p) Chitty, Prerog. 5.

the doing of an illegal act; for although the commanders are trespassers, so are also the persons who did the fact" (g).

In his classification of the grounds of immunity, Professor Kenny treats *public civil subjection* as a separate excuse (r), although at the same time pointing out that it "rarely affords any defence in English law." It may be doubted whether it ever does so; for the cases in which it might have been pleaded have always been covered by one or other of the better established excuses of advancement of justice and Royal prerogative.

"A soldier or sailor or constable, who unlawfully does violence to anyone, cannot simply plead as a defence that he was acting under orders from his superior officer, or even from the King himself.

"Of course such orders, when not *obviously* unlawful, may be relevant to his defence under some more general rule of law. They may give him such a 'claim of right' as renders it no larceny for him to appropriate another man's goods; or such grounds for supposing his conduct to be lawful as will render his mistake of fact a valid defence.

"And more than this, by a special rule as to public subjection (s), a mistake even of law may afford a defence to a public servant who has obeyed unlawful orders under a reasonable (though mistaken) belief that they were lawful. Thus when violence is exercised by a gaoler or hangman in carrying out an invalid sentence, then, though the violence was criminal, yet if the court which passed the sentence had jurisdiction over the offence, and the sentence had all reasonable appearance of validity, the man's public official subjection affords him immunity. And a marine who, to obey orders, shoots a boatman who insists on rowing up to the ship, *seems* (t) not guilty of murder if he knew that the orders were given lest the boatman should promote a mutiny on board; for such orders he might reasonably fancy to be lawful. Yet he would be guilty if he knew them to be given from a mere desire to keep the ship agreeably isolated.

"There is not yet, however, any conclusive English authority for thus extending to the military and naval forces the immunity which the common law conceded to gaolers and other civil functionaries (u). And the Courts of the United States have repeatedly refused to recognise any such extension; and insist that a soldier or sailor cannot plead

(g) *Sands v. Child and Others*, 3 Lev. 352 (1693), per Curiam.

(r) Kenny, *Outl.*, 70; cf. Ken., S. C. 59.

(s) Rather, a special rule as to the advancement of justice.

(t) *R. v. Thomas*, *ub. inf.*

(u) Vide *supra*, note (s).

his commander's orders as a defence unless they not merely *seemed* to be legal but actually were so " (x).

In the case of *R. v. Thomas* (y), above referred to, the prisoner, a marine on board H.M.S. *Achille* in the Medway, was placed as sentinel with orders to keep off all boats while the crew were being paid off; and he was armed with a loaded musket for that purpose. One boat, on which was the deceased, persisted in coming close to the ship, after repeated warnings to keep off; and the prisoner fired at it, killing the deceased. He was convicted of murder, but was found to have fired the fatal shot under the impression that it was his duty to do so. The judges upheld the conviction (though recommending a pardon), adding, however, that the homicide would have been justifiable if the act had been necessary for the preservation of the ship, as if the deceased had been stirring up a mutiny.

There is one important doctrine concerning the Royal prerogative which certainly does, in some few isolated cases, have the effect of conferring upon Crown servants a special excuse or justification, in respect of acts, otherwise criminal, performed under official authority or in the regular fulfilment of their official duties.

The doctrine referred to is the well-established one that the Crown is not bound by the provisions of any statute unless expressly named therein :—

"The general rule clearly is, that though the King may avail himself of the provisions of any Acts of Parliament, he is not bound by such as do not particularly and expressly mention him.

"To this rule, however, there is a most important exception, namely, that the King is impliedly bound by statutes passed for the public good; the relief of the poor; the general advancement of learning, religion and justice; or to prevent fraud, injury or wrong. . . .

"But Acts of Parliament which would divest or abridge the King of his prerogatives, his interests or his remedies, in the slightest degree, do not in general extend to, or bind the King, unless there be express words to that effect. Therefore the Statutes of Limitation . . . are irrelevant in the case of the King; nor does the Statute of Frauds elate to him. . . .

(x) Kenny, Outl., 70-1.

(y) 4 M. & S. 441; Russ. 813-4 (1816); cf. charge of Byles J, to grand jury, *R. v. Hutchinson*, 9 Cox, 555 (1864).

“And in mere indifferent statutes, directing that certain matters shall be performed as therein pointed out, the King is not thereby in many instances prevented from adopting a different course, in pursuance of his prerogative” (z).—

The nature of the subject-matter of most penal statutes is such as to come clearly within the exceptions above enumerated, and as to preclude any possibility of applying the general rule of implied Crown exemption.

But wherever (the Crown not being expressly named) penal legislation can be more reasonably construed as excluding than as intended to bind the Crown, such public officers as may infringe its provisions within the bounds of their public authority, or of their employment by or under the Crown, are by virtue of their public status entitled to plead Crown prerogative as entitling them to immunity from criminal proceedings under the statute in question.

Thus, in *R. v. Justices of Kent* (a), where an information had been laid against a sub-postmaster, carrying on a baker's business in the same shop as his post office, for having an unjust scale in his possession (b), it being proved that the scale in question belonged to the post office and was Crown property, application was made for a writ of prohibition, and it was held that the justices had no jurisdiction in the matter, because the provisions of the Act did not apply to scales which were the property of the Crown.

In *Gorton Local Board of Health v. Prison Commissioners* (c) the Court decided, upon a case stated, that the Public Health Act, 1875 (d), and the bye-laws made thereunder, prohibiting the occupation of houses until certified by the local authority as fit for human habitation, had no application to land acquired by the Crown for the purpose of building a prison :—

“In the absence of express words the Crown is not bound, nor is the Crown to be affected except by necessary implication. There are many cases in which such implication does necessarily arise, because otherwise the legislation would be unmeaning. That is what I under-

(z) Chitty, Prerog., 382-4.

(a) 24 Q. B. D. 181 (1889).

(b) Under the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 25.

(c) 1904, 2 K. B. 165, n. (1887); cf. *Hornsey Urban Council v. Hennell*, 1902, K. B. 73.

(d) 38 & 39 Vict. c. 55.

stand as 'necessary implication.' Here the Crown is not mentioned, and no necessary implication of any sort or kind arises, and it is clear that the Crown by its officials is quite competent to provide for the sanitary condition of these houses. It is quite competent to do all that it thinks fit to be done in the matter, and it is not to be controlled—that is, to my mind, a matter of the greatest public interest—the State is not to be controlled in the disposition of the property entrusted to the State for State management by any local authority whatever" (e).

"In my judgment, however anxious one may naturally be to confine the application of the prerogative within its legitimate limits, it seems to me that it is clear, from authority and from principles which are established beyond cavil or dispute, that the Crown is not bound unless it is expressly or by necessary implication named. How can it be said here that there is a necessary implication of the Crown? It is not necessary, as it seems to me, for the purposes of the public health and public good, which are intended to be served by the Public Health Act, that this jurisdiction should be vested in the local board. . . . There is certainly as much reason in legislation giving credit to the Secretary of State that he would do his duty and would see that the great interests of the health of the public were regarded as in supposing that the local board in each district would do its duty. . . .

"One was naturally struck with the argument, at first, that we find a particular saving clause with regard to some portion of the rights of the Crown in sect. 327 of the Public Health Act, and therefore that it may be presumed that all other exceptions of the Crown were intended to be done away with and to be given up. . . . It is impossible for us to say that really was the intention of the clause, and I think that that clause was put in simply *ex abundanti cautela*" (f).

By the Locomotives Act, 1865 (g), power was given to local authorities to make regulations as to the speed at which locomotives might pass along the roads through the places subject to their jurisdiction; and by sect. 4 of the Act it was provided that, subject to those regulations, it should not be lawful to drive any locomotive along any highway at a greater speed (in a town or village) than two miles an hour (h). In *Cooper v. Hawkins* (i) upon a case stated by justices on conviction of

(e) Per Day, J.

(f) Per Wills, J.; cf. per Lord Alverstone, C.J., in the *Hornsey Case*, 1902, 2 K. B. at pp. 80-1.

(g) 28 & 29 Vict. c. 83, s. 8; now Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 6.

(h) See now the Motor Car Acts, 1896 and 1903, expressly binding the Crown (3 Edw. 7, c. 36, s. 16).

(i) 1904, 2 K. B. 164.

a civilian, employed as an engine driver by the War Office on behalf of His Majesty, for exceeding the speed limit while driving a locomotive through the town of Aldershot, it was held that in the absence of any express mention of the Crown in the Act, the section did not apply to a locomotive owned by the Crown, and driven by a servant of the Crown on the Royal service :—

“The point of difficulty in this case is that sect. 4 of this Act is a section which must be held to be enacted for the public safety, and therefore it is contended that, the object of the Act being to protect the public, it ought to be held to bind the Crown. I cannot myself regard such a section as this as coming within that category, and if I compare it with the provision which was the subject of consideration in the *Gorton Case*, all I can say is, that this seems to be far less of that character than the one then under consideration” (k).

“I think that the fact of there being a power in an Act for a local authority to make by-laws is a strong argument—I do not say it is conclusive—there may be other considerations which outweigh it—against holding that the Crown is bound by it. . . .

“The military department is of that character that to have this kind of interference might hamper the military service exceedingly. . . .

“If the man were drunk, or under circumstances in which he was not performing a public duty, and was not acting in accordance with superior orders, he would be liable, although driving an engine belonging to the Crown ; but in this case no such consideration arises. I understand from the case that the excess of speed was in conformity with orders. It may be that they were not orders specifically to go more than three miles an hour, but the driver was told, as I read it, that the coal was to be conveyed before nightfall to a particular place, and, as I understand, it was necessary, in order that that should be done, that he should go at a pace which exceeded the limits imposed by the section. If so, this is a case, beyond all doubt, in which the act of the man is the act of the Crown” (l).

Under the head of “privilege” may be noticed such immunities from criminal proceedings as may be claimed by either of the two Houses of Parliament, in favour of their respective members, or of other persons, whose conduct, though contrary to some provision of the common law or of a penal statute, may be alleged to have been legalised by virtue of parliamentary privilege.

• (k) Per Lord Alverstone, C.J

(l) Per Wills, J.

With regard to the exclusive jurisdiction claimed by both Houses to adjudicate upon any acts done by their express orders, whether by members or servants of Parliament or by other persons, and also to adjudicate upon any occurrences confined to the precincts of either House, there has always been a sharp difference of opinion between the judicial authorities and the upholders of parliamentary privilege.

"Although the Courts will neither interfere with Parliament in its punishment of offenders, nor assume the general right of declaring or limiting the privileges of Parliament, they are bound to administer the law of the land, and to adjudicate when breaches of that law are complained of. The jurisdiction of Parliament, and the jurisdiction of the Courts, are thus liable to be brought into conflict. The House of Lords, or the House of Commons, may declare a particular act to have been justified by their order, or to have been in accordance with the law of Parliament; while the Courts may decline to acknowledge the right of one House to supersede by its sole authority the laws which have been made by the consent, or which exist with the acquiescence, of all the branches of the Legislature" (*m*).

So far, the cases in which this conflict has arisen from time to time (*n*) have all been of a civil nature; but there can be no doubt that the same principles would be applied by the Courts to criminal proceedings as have been asserted with respect to civil actions: viz., that parliamentary privilege is part of, and not paramount over, the law of the land, and that although it affords a complete defence wherever it actually arises (*o*), it is always within the competence of a Court of law to decide whether any matter complained of is, or is not, within the limits of the excuse put forward, neither House having any power to define or declare its own privileges in such a manner as to preclude judicial inquiry on the point (*p*).

In the particular matter of the printing of parliamentary papers, any possibility of a conflict between Parliament and the Courts has been disposed of by statute (*q*), which has conferred upon the defendant or defendants in any proceedings, whether civil or criminal, in respect

(*m*) May, 131.

(*n*) Vide May, 132 et seq.

(*o*) *Bradlaugh v. Gossett*, 12 Q. B. D. 271 (1884).

(*p*) Vide *Stockdale v. Hansard*, 9 Ad. & E. 1 (1837), per Littledale, J.; cf. *Bradlaugh v. Gossett*, *ib. sup.*

(*q*) Parliamentary Papers Act, 1840 (3 & 4 Vict. c. 9), s. 1.

of the publication of any report, paper, votes or proceedings, by or under the authority of either House of Parliament, "a summary stay of proceedings, like the remedy given to ambassadors under the statute of Anne" (r).

In *Williamson v. Norris* (s), where a servant of the House of Commons was charged with selling, without a licence, and to a person not being a member of Parliament, liquor belonging to the Kitchen Committee, at a bar within the precincts of the House, it was argued that no offence had been committed, on the ground that the Houses of Parliament, in the regulation of their internal arrangements as to the sale of liquor, were entirely outside the control of the law. It was not found necessary to decide this question (t), but Lord Russell, C.J., said :—

"I am far—very far—from being satisfied that no offence has been committed. I am not at all impressed by the argument that because many of the provisions of the Licensing Acts cannot be worked with reference to the House of Commons, therefore the Acts do not apply. It does not follow that intoxicating liquor can lawfully be sold without a licence, because some of the provisions of the Licensing Acts are inapplicable. . . . It is obvious that an appeal should be made to the Legislature to legalise and regulate what is going on, if Parliament thinks it expedient that the sale of liquor should take place within the precincts of the Houses of Parliament" (u).

The personal privilege of general freedom from arrest enjoyed by members of either of the two Houses "has always been limited to civil causes, and has not been allowed to interfere with the administration of criminal justice" (x).

Although in *Wilkes' Case* (y) it was held, upon the authority of Coke (z), that parliamentary privilege applied to all matters except "treason, felony and the peace," and therefore availed for the protection of a member charged with publishing a seditious libel, it was afterwards resolved by both Houses—

"That privilege of Parliament does not extend to the case of writing and publishing seditious libels, nor ought to be allowed to obstruct the

(r) *Mangena v. Wright*, 25 T. L. R. 534, per Phillimore, J., at p. 538; vide *infra*.

(s) 1899, 1 Q. B. 7.

(t) *Ante*, Chap. X.

(u) Per Lord Russell, C.J., pp. 12-13; cf. per Wills, J., at p. 15.

(x) May, 115.

(y) 19 St. Tr. 981 (1763).

(z) 4 Inst. 25.

ordinary course of laws in the speedy and effectual prosecution of so heinous and dangerous an offence."

It may therefore be laid down as tolerably clear, according to the practice of Parliament, which would no doubt be recognised on such a point by the Courts of law, that the personal privilege of freedom from arrest allowed in civil cases is not claimable for any indictable offence (a).

Another, and a somewhat more important, form of privilege by status, is the immunity from the jurisdiction of the Courts which is enjoyed by all ambassadors and foreign ministers duly accredited to His Majesty, and the persons in their service (b).

All classes of diplomatic agents, viz., ambassadors, papal legates and nuncios, envoys and ministers plenipotentiary, ministers resident and chargés d'affaires—but not consuls, who are commercial agents only (c)—are, by the doctrines of extritoriality and diplomatic inviolability, entitled to immunity from arrest and from the jurisdiction of our Courts, even in respect of criminal matters, however serious; and although this immunity has been recognised by statute (d), it does not depend solely upon written law, but arose at common law (e).

The privilege comes into existence as soon as the foreign minister comes into this country, being provided with a regular passport or proper credentials, and it protects him until his departure.

It amounts to more than a mere personal privilege, for under the doctrine of extritoriality the residence of a foreign minister in this country is deemed to be a continuing residence in his own country; and the immunities from arrest and jurisdiction attach not only to the secretary of a legation, in his own right (f), but also in a derivative manner to all *bonâ fide* servants and persons belonging to a minister's suite or household (g).

(a) May, 116, 273.

(b) St. Dig., art. 101.

(c) *Viveash v. Becker*, 3 M. & S. 284 (1814).

(d) 7 Anne, c. 12.

(e) *Case of Leslie, Bishop of Ross*, Snow, 83 (1571); *Mendoza's Case*, ib 85 (1584); Bac. Max., Reg. V.; *Parkinson v. Potter*, 16 Q. B. D. 152 (1885), per Mathew, J.

(f) *Taylor v. Best and Others*, 14 C. B. 487 (1854) cf. *Sa's Case*, Snow, 86 (1653).

(g) 7 Anne, c. 12; *Triquet v. Bath*, 3 Burr. 1478 (1765); *Parkinson v. Potter*, *ib. sup.*

To be sure, even an ambassador may be arrested and imprisoned when his conduct is such as to endanger the safety of the State to which he is accredited (*h*); but the justification of such a step is that of self-defence (*i*), and its exercise by the Government would not seem to confer jurisdiction upon the Courts to proceed to trial and conviction of the offender in ordinary course of law.

In practice these immunities are seldom the cause of any injustice or inconvenience, the usual procedure being for offending members of a minister's suite, upon accusation of any crime committed outside their master's house, to be sent by him to the local tribunals for trial, and if the privilege is not waived in that manner, the evidence is collected by the ambassador himself, and the accused is sent by him to his own Government for trial.

Apart altogether from the principle of diplomatic immunity, it seems to follow from *McLeod's Case* (*k*) that agents of a foreign State committing acts of violence or illegality in this country, under the orders of their own Government, can by the law of nations claim exemption from the criminal jurisdiction of our Courts over such conduct, at any rate as soon as responsibility for such acts has been distinctly assumed by the foreign State in such a manner as to afford a *casus belli*.

VII. CONSENT.

There are comparatively few crimes in relation to which consent forms a ground of justification.

The maxim *volenti non fit injuria* finds its chief application to civil wrongs, and is available under the criminal law only where the offence charged affects exclusively the person consenting, and where its mischief does not extend, even indirectly, to other persons, or to the public in general.

In other words, it is necessary for every defendant putting forward consent as a reason for his acquittal, not only to prove that complete and voluntary consent was in fact obtained from the person chiefly injured by his conduct, but also to show that the offence with which he stands charged is recognised by the law as capable of being so justified.

(*h*) *Gyllenborg's Case*, Snow, 87 (1717).

(*i*) *Ib.*

(*k*) Snow, 175 (1841).

With regard to crimes against property, the excuse of consent is for obvious reasons seldom put forward ; but wherever it is satisfactorily proved that the owner of real or personal property has given a free and full consent to acts solely affecting his own proprietary rights, such a plea may well afford a good defence, even upon the most serious charge.

For example, the heinous crime of arson, so far as it concerns private buildings, is expressly defined by statute (l) as the "unlawfully and maliciously" setting fire to a building "with intent to injure or defraud any person." It can hardly be doubted that if one set fire to an empty barn or hut, in the middle of a large field, with the full and free consent of the owner, and nobody else were interested or affected, there could be no conviction of arson under the section above referred to. Although the word *maliciously* is explained in the statute as not necessarily involving the motive of "malice conceived" against the owner of the property" (m), and "the intent to injure or defraud" need not be proved to have been directed against "any particular person" (n), yet the fact that the only party affected or damaged by the act had consented for his own reasons to sacrifice his property would be sufficient to make the language of the statute inapplicable and to render the conduct lawful.

Again, burglary involves a "breaking" into the dwelling-house entered ; and although this may be a constructive breaking, by intimidation or even by fraudulent pretexts (o), it is quite incompatible with consent. It has therefore been held that if the occupier of a house voluntarily causes the door to be opened to the person entering, in order that he may enter with the purpose of committing a felony in the house—even if the object of so letting him in be his detection and prosecution—there is no constructive breaking ; and there can in such a case be no conviction of burglary (p).

The distinction just mentioned affords a good illustration of the doctrine of consent under the criminal law. In order to constitute true consent, there must be a full and voluntary concurrence of intention between the two parties, directed to all the essential acts which (in the

(l) 24 & 25 Vict. c. 97, s. 3.

(m) Sect. 58.

(n) Sect. 60.

(o) 1 Hawk., c. 38, ss. 9 and 10.

(p) *R. v. Johnson*, C. & M. 218 (1841); cf. *R. v. Chandler*, 8 Cr. A. R. 82 (1912).

absence of consent) would form the crime charged; and lack either of material knowledge or of full *consensus ad idem* will render the alleged consent incomplete, and leave the act unjustified (*q*). So, if the alleged consent to a burglary amounts to no more than facilitating the breaking and entry by purposely leaving a door unbolted, it is no consent to the act at all (*r*).

Again, in connection with "larceny by trick," there are numerous cases illustrative of the division between true *consensus ad idem* and partial assent, vitiated by fraud, where the victim or his duly authorised agent (*s*) does not rightly understand the whole transaction, and does not in fact fully and freely consent (*t*) to be deprived of his property or the possession thereof (*u*).

"In some cases an actual 'trick' is carried out, some false artifice or misrepresentation, like those involved in the use of false weights, or in the practices of ring-dropping (*x*) and 'ringing the changes' (*y*), or in the 'confidence trick' (*z*). Still simpler pretences are a representation by the thief that he has been sent by customers to fetch away the goods (*a*) they had bought; or a representation that he wants change for a sovereign, which affords him an opportunity of running off with both the sovereign and the change also (*b*). But it is not essential that there should be any such *active* fraud. It is enough if the offender obtains the thing from the owner, fully intending to appropriate it, and knowing at the same time that the owner does not intend him to appropriate it" (*c*).

And it has been expressly decided that consent given under duress, though only of false imprisonment or detention, and not amounting to menaces of personal violence, is not consent at all so as to excuse larceny (*d*).

(*q*) Vide *R. v. Ashwell*, 16 Q. B. D. 190 (1885), per Lord Coleridge, C.J.

(*r*) *R. v. Egginton*, 2 Leach, 913; 5 R. R. 689; Ken., S. C. 260.

(*s*) Vide *R. v. Middleton*, L. R. 2 C. C. R. 38; Ken., S. C. 266; *R. v. Harrison*, 1 Leach, 47; Ken., S. C. 274; *R. v. Featherstone*, Dears. 369; Ken., S. C. ib.

(*t*) As in *R. v. Macdaniel and Others*, Fost. 121, ⁶ Ken., S. C. 259.

(*u*) Vide Kenny, Outl., 205-6.

(*x*) *R. v. Patch*, 1 Leach, 238.

(*y*) *R. v. McKale*, L. R. 1 C. C. R. 125.

(*z*) *R. v. Standley*, R. & R. 305.

(*a*) *R. v. Hench*, R. & R. 163; Ken., S. C. 264.

(*b*) *R. v. Williams*, 6 C. & P. 390; Ken., S. C. 265.

(*c*) Kenny, Outl., 206-7; cf. Rosc. 535 et seq.

(*d*) *R. v. McGrath*, L. R. 1 C. C. R. 205; Ken., S. C. 262.

It is with regard to offences against the person that difficulty most frequently occurs in marking the line between guilt and innocence in connection with consent.

Crimes of extreme bodily violence, and some crimes of immorality, although principally affecting the person against whom they are directed, are by our law recognised as being obnoxious to the public in general; and for that reason they cannot be rendered innocent, even by complete and voluntary consent on the part of the person chiefly concerned.

For instance, a man's body and life do not belong to him absolutely (e). The community requires both his life to be preserved and his body to be kept unimpaired for the public good. Therefore one cannot by reason of consent, in any form whatsoever, justify murder (f), maiming (g), or assistance or participation (h) in the crime of *felo de se* (i).

There is one species of homicide where consent might seem at first sight to confer justification, viz., murder or manslaughter by neglect; for in *R. v. Smith* (k) it was laid down that, where a domestic servant had the free control of her actions and was able to take care of herself, but elected for her own reasons to remain in the service of a mistress who allowed her to be starved and badly lodged, the mistress was not criminally responsible for her death, although it resulted from such neglect. Here, however, the real justification did not lie in the deceased's consent to being killed, but in the absence of that helplessness or physical dependence which (coupled with the relationship of parentage or service, or with a control and responsibility voluntarily assumed) is the necessary foundation of a legal duty on the part of one person to take active steps for the preservation of another's life (l).

Again, consent cannot be pleaded as an excuse by either of two parties engaged in a breach of the peace :—

(e) Hale, I., 411.

(f) 1 Hawk., c. 27, s. 6; *R. v. Sawyer*, Russ. 660, n. (1815); *R. v. Barronet*, 1 E. & B. 1 (1852).

(g) 1 Inst. 107 a, b; Hale, *ub. sup.*; St. Dig., art. 228.

(h) Vide *R. v. Russell*, Moo. 356; cf. *R. v. Fretwell*, L. & C. 161.

(i) *E. v. Dyson*, R. & R. 523 (1823); *R. v. Alison*, 8 C. & P. 418 (1838); *R. v. Jessop*, 16 Cox, 204 (1887); *R. v. Stormouth*, 61 J. P. 729 (1897); *R. v. Abbott*, 67 J. P. 151 (1903).

(k) L. & C. 607 (1865).

(l) *Ante*, Chap. VIII.

"No one has a right to consent to the infliction of bodily harm upon himself in such a manner as to amount to a breach of the peace, or in a prize-fight or other exhibition calculated to collect together disorderly persons" (m).

In *R. v. Coney* (n), though the judges were not unanimous as to what amounts to aiding and abetting in a prize-fight, it was held by the whole Court that all persons who do aid and abet therein are guilty of an assault, and that consent on the part of the persons actually engaged in the fighting to the interchange of blows does not afford any answer to the criminal charge of assault:—

"The true view is, I think, that a blow struck in anger, or which is likely or is intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely, nor intended, to cause bodily harm, is not an assault, and that, an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial. If this view is correct, a blow struck in a prize-fight is clearly an assault; but playing with single-sticks or wrestling do not involve an assault, nor does boxing with gloves, in the ordinary way" (o).

"The principle as to consent seems to me to be this: When one person is indicted for inflicting personal injury upon another, the consent of the person who sustains the injury is no defence to the person who inflicts the injury, if the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured. But the injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the lives and the health of the combatants should be endangered by blows, and because prize-fights are disorderly exhibitions, mischievous on many obvious grounds. Therefore the consent of the parties to the blows which they mutually receive does not prevent those blows from being assaults. . . .

"In cases where life and limb are exposed to no serious danger in the common course of things, I think that consent is a defence to a charge of assault, even when considerable force is used, as for instance, in cases of wrestling, single-stick, sparring with gloves, football and the like; but in all cases the question whether consent does or does not take from the application of force to another its illegal character, is a question of degree depending upon circumstances" (p).

(m) St. Dig., art. 229; Fost. 260; 1 East, P. C. 270.

(n) 8 Q. B. D. 534 (1882).

(o) Per Cave, J., at p. 539.

(p) Per Stephen, J., at p. 549; cf. per Hawkins, J., at pp. 553-5, and *R. v. Billingham*, 2 C. & P. 234 (1825), per Burrough, J., and *R. v. Perkins*, 4 C. & P. 537 (1831).

Consent can hardly enter into the consideration of voluntary manslaughter, which is differentiated from murder only by the existence of provocation ; but with regard to involuntary manslaughter the element of consent raises questions of some difficulty, for the solution of which there appears to be no reliable authority.

"It is uncertain to what extent any person has a right to consent to his being put in danger of death or bodily harm by the act of another. . . .

"A., with B.'s consent, wheels B. in a barrow along a tight-rope at a great height from the ground. C. hires A. and B. to do so ; D., E., and F. pay money to C. to see the performance. B. is killed. *Quære*, are A., C., D., E. and F., or any and which of them, guilty of manslaughter ? . . .

"There is, so far as I know, no authority on this point, but the principle on which prize-fights have been held to be illegal might include such a case. Such an exhibition might also under circumstances be a public nuisance. To collect a large number of people to see a man put his life in jeopardy is a less coarse and boisterous proceeding than a prize-fight, but is it less immoral ? " (g).

If the law on the point were as Stephen suggested, an act of homicidal recklessness would be committed whenever an experienced aviator took a passenger on his aeroplane, at any rate if a crowd assembled to watch them. There seems, however, to be a clear distinction between such cases and that of a prize-fight.

Where a tight-rope walker takes a passenger over his rope in a wheelbarrow, there is certainly a great element of risk to both parties, which casts a responsibility upon the persons managing the entertainment, and no doubt provides the whole attraction thereof to the crowd of onlookers. But here, although the risk is a known one, and great in comparison with that of walking on a plank or on *terra firma*, it is usually remote enough to relieve any of the parties from the guilt of manslaughter. The equilibrist is skilled in the performance of his trick, and the consent both of the performer and of his companion to be put in such peril as there may be is accompanied by a reliance (on the part both of the performer himself and of the other parties concerned) upon that skill. That reliance or confidence, if reasonably entertained, as it usually is, renders the known probability of any fatal consequence sufficiently remote to preclude gross homicidal recklessness. It would

(g) St. Dig., art. 230, illustration and footnote ; cf. Kenny, Outl., 110-11.

be very different if the performer attempted, and were allowed to attempt, the performance of his task when intoxicated, or when obviously incapable of accomplishing it with his usual skill.

In the case of prize-fights, the greater the skill the greater the danger ; or at least, the skill of the combatants cannot reasonably be relied upon, either by themselves or by the persons aiding and abetting them, as a safeguard against that extreme danger which is inherent to the violent and unrestrained interchange of blows.

Similar considerations enter into the question in what cases, and to what extent, consent legalises surgical operations. This question was dealt with by Stephen in two articles, which he prefaced with the observation: "I know of no authority for these propositions, but I apprehend they require none. The existence of surgery as a profession assumes their truth."

"Article 225.—Every one has a right to consent to the infliction of any bodily injury in the nature of a surgical operation upon himself or upon any child under his care, and too young to exercise a reasonable discretion in such a matter, but such consent does not discharge the person performing the operation from the duties hereinafter defined in relation thereto.

"Article 226 (submitted).—If a person is in such circumstances as to be incapable of giving consent to a surgical operation, or to the infliction of other bodily harm of a similar nature and for similar objects, it is not a crime to perform such operation or to inflict such bodily harm upon him without his consent or in spite of his resistance" (r).

These rules seem to afford satisfactory, if not unchallengeable, solutions of the problem above stated. The modern practice of surgery has, however, been enormously extended since Stephen wrote, and a rule of justification has lately been suggested which seems to go somewhat further than his propositions:—

"The trend of legal opinion is in favour of the proposition that no criminal responsibility is incurred by a surgeon who, with proper care and skill, and for the physical benefit of a sick person, performs on him a surgical operation even without his consent" (s).

In the case of a rational adult person suffering from some disease or

(r) St. Dig. p. 164.

(s) Russ. 887.

ailment, and competent in every way to give or refuse his consent to the performance of an operation, it is conceived (notwithstanding the passage just quoted) that if such consent were withheld, a surgeon operating upon the unwilling patient would incur the guilt not only of an assault, but of unlawful and malicious wounding. There can hardly be more justification for operating upon a man's body against his will, for his real or supposed benefit, than for inflicting corporal chastisement or bodily harm upon him, for the real or supposed good of his soul.

But where a patient is prevented, by extreme shock, unconsciousness, fever or some similar cause, from yielding a consent which it might reasonably be supposed he would have granted if fully rational and cognizant of the circumstances, and able to exercise a calm and reasonable choice in the matter, it can scarcely be questioned that the presumed consent would suffice to justify any surgical or other means properly taken for his own benefit.

In all such cases a competent and careful surgeon, operating after consultation with another or others (where that precaution is both possible and necessary), no more commits an assault than does a physician who feels the pulse of a sleeping or delirious patient; and if he unfortunately fails or even injures, where he honestly and skilfully attempts to cure, the wounding is not malicious, and cannot form the ground of a criminal charge.

Nor is there much, if any, room for doubt as to the competency of a father or other legal guardian, or even a person having the temporary custody of a child, to grant consent on behalf of one who, for lack of discretion and experience, is incapable of sane and competent judgment upon such an important matter.

With regard to the doctrine of consent in relation to assaults in general, and to sexual intercourse in particular (*t*), the law was considered and discussed at some length in *R. v. Clarence* (*u*), where it was held by nine judges out of thirteen, upon a case reserved, that a husband, having intercourse with his wife whilst knowing himself to be suffering from a contagious disease (she being unaware thereof), could not be convicted

(*t*) Vide Criminal Law Amendment Acts 1880 and 1885, and *R. v. Lock*, L. R. 2 C. C. R. 10, as to children.

(*u*) 22 Q. B. D. 23 (1888).

either of the offence of unlawfully and maliciously inflicting grievous bodily harm (x), or of an assault occasioning actual bodily harm (y).

Although this decision proceeded upon wider reasons than the doctrine of consent, Stephen, J., made the following observations upon that element in the case :—

“ It seems to me that the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the words, and without qualification. It is too short to be true, as a mathematical formula is true. If we apply it in that sense to the present case, it is difficult to say that the prisoner was not guilty of rape, for the definition of rape is having connection with a woman without her consent ; and if fraud vitiates consent, every case in which a man infects a woman or commits bigamy, the second wife being ignorant of the first marriage, is also a case of rape. Many seductions would be rapes, and so might acts of prostitution procured by fraud, as for instance by promises not intended to be fulfilled. These illustrations appear to show clearly that the maxim that fraud vitiates consent is too general to be applied to these matters as if it were absolutely true. I do not at all deny that in some cases it applies, though it is often used with reference to cases which do not fall within it. For instance, it has nothing to do with such cases as assaults on young children. A young child who submits to an indecent act no more consents to it than a sleeping or unconscious woman. The child merely submits without consenting. The only cases in which fraud indisputably vitiates consent in these matters are cases of fraud as to the nature of the act done. As to fraud as to the identity of the person by whom it is done, the law is not quite clear. In *R. v. Flattery* (z), in which consent was obtained by representing the act as a surgical operation, the prisoner was held to be guilty of rape. In the case where consent was obtained by the personation of a husband, there was, before the passing of the Criminal Law Amendment Act of 1885, a conflict of authority. The last decision in England, *R. v. Barrow* (a), decided that the act was not rape ; and *R. v. Dee* (b), decided in Ireland in 1884, decided that it was. The Criminal Law Amendment Act of 1885 ‘declared and enacted’ that thenceforth it should be deemed to be rape, thus favouring the view taken in *R. v. Dee*. I do not propose to examine in detail the controversies connected with these cases. The judgments in the case of *R. v. Dee* examine all of them minutely, and I think they justify the observation that the

(x) 24 & 25 Vict. c. 100, s. 20.

(y) *Ib.*, s. 47.

(z) 2 Q. B. D. 410 (1877).

(a) L. R. 1 C. C. R. 158 (1868).

(b) 14 L. R. Ir. 468.

only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act. There is abundant authority to show that such frauds as these vitiate consent both in the case of rape and in the case of indecent assault. I should myself prefer to say that consent in such cases does not exist at all, because the act consented to is not the act done. Consent to a surgical operation or examination is not consent to a sexual connection or indecent behaviour. Consent to connection with a husband is not consent to adultery.

"I do not think that the maxim that fraud vitiates consent can be carried further than this in criminal matters. . . .

"The woman's consent here was as full and conscious as consent could be. It was not obtained by any fraud either as to the nature of the act or as to the identity of the agent. The injury done was done by a suppression of the truth. It appears to me to be an abuse of language to describe such an act as an assault. It is not stated at what interval after December 20 the disease showed itself, but there must have been some interval during which it was uncertain whether infection had been communicated or not. During this interval, was the man guilty or not? If he was, it seems extraordinary to say that he had committed an assault from which an event which was not in his power could set him free. If he was not, it seems to me equally strange to say that he could be deprived of his innocence by such an event. In some cases no doubt such an interval might elapse. If a man laid a trap for another into which he fell after an interval, the man who laid it would during the interval be guilty of an attempt to assault, and of an actual assault as soon as the man fell in. In the case of death inflicted by violence, the criminal might at first be guilty of an assault or an unlawful wounding and his crime would become murder or manslaughter on the death of the person wounded; but in the case of an attempt the intention to consummate the crime exists from the first, and in the case of murder the act which ultimately becomes murder is in itself a crime whether death ensues or not. In this case there was no intention, and therefore no attempt to infect, and it seems anomalous to make a consequence which, though highly probable, was neither intended nor necessary, relate back to its occurrence in such a way as to turn an act not punishable itself into a crime" (a).

The offences of rape (d) and indecent assault (e) are peculiar in this respect, that the onus lies, not upon the prisoner to prove, but upon

(c) Per Stephen, J., at pp. 43-6.

(d) *R. v. Bradley*, 4 Cr. A. R. 225, 228 (1910).

(e) *R. v. Horn*, 7 Cr. A. R. 200, 202 (1912).

the prosecution to disprove, consent on the part of the person ravished or assaulted.

The rule as to the way in which juries ought to be directed, in all cases of this description, has recently been laid down by the Court of Criminal Appeal as follows:—

“ In cases where indecent assault or a kindred offence is charged, we are of opinion that if the facts of a case are such that the jury might reasonably infer that the prosecutrix consented to the acts alleged, there ought to be a direction to the jury by the judge both as to the onus which is on the prosecution to prove non-consent on the part of the prosecutrix, and also as to the evidence given in the case dealing with the question of consent. But that if the facts proved are not such that the jury may reasonably infer consent, and particularly if the case has been conducted by counsel so as to make the question of consent an entirely secondary issue, there is no necessity for such a direction ” (f).

The rule that it lies on the prosecution to show the absence of consent, on a charge of rape, applies even where the person alleged to have been ravished is *non compos mentis* (g). In such a case, “ a consent produced by mere animal instinct would be sufficient to prevent the act from constituting a rape ” (h); but if the girl were “ in such a state of idiocy as to be incapable of expressing either consent or dissent,” the act, being committed without her consent, would be a rape (i); the presumption of law being that there can be no consent in a state of unconsciousness (k): so that general evidence of extreme mental incapacity may well suffice (l).

The point is now of less importance than formerly, in view of the modern legislation for the protection of idiots, imbeciles and lunatics (m), and defectives (n).

(f) *R. v. May*, 1912, 3 K. B. 572; cf. *R. v. Horn*, *ub. sup.*

(g) *R. v. Fletcher*, L. R. 1 C. C. R. 39 (1866).

(h) Per Willes, J., in *R. v. Fletcher*, 28 L. J. M. C. 85, 86 (1859).

(i) *Ib.*

(k) *R. v. Ryan*, 2 Cox, 115 (1846); cf. *R. v. Pressy*, 10 Cox, 635 (1867).

(l) *R. v. Barratt*, L. R. 2 C. C. R. 81 (1873).

(m) 48 & 49 Vict. c. 69, s. 5; 53 & 54 Vict. c. 5, s. 324.

(n) Mental Deficiency Act, 1913, s. 56

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